TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 70.

LOUIS B. ADAMS AND WATSON N. SHILLING, APPELLANTS,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, ADMINISTRATOR OF EDWARD A. REED, DECEASED, AND MILLIE G. REED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 9, 1895.

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(16,057.)

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Amended complaint	1	1
Answer to amended complaint	14	8
Stipulation as to answer to cross-complaint	27	16
Report of special master and referee	28	17
Finding of facts	29	17
Conclusions of law	41	25
Judgment and decree	43	26
Stipulation as to cross-complaint, &c	45	27
Statement on motion for new trial and appeal	46	28
Documentary evidence offered	47	29
Testimony of James N. Kimball	50	31
L. B. Adams	52	32
H. H. Henderson	55	34
K. S. Boreman	60	38
Stipulation as to evidence	65	41
Specification of particulars in which the evidence is insufficient to sustain the findings and decision of the court and of the master	68	42

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	Original.	Print.
Specification of particulars in which the conclusions of law and decision of the court and master are against the law	68	43
Specification of errors of law occurring at the trial and excepted to by plaintiffs	69	43
Notice of statement	70	44
Master's certificate to statement	71	44
Agreement as to statement	71	44
Notice of appeal	72	45
Order overruling motion for new trial	73	45
Agreement as to transcript on appeal	73	45
Hearing and submission	75	46
Decree	76	46
Allowance of appeal	76	46
Opinion	77	47
Citation and service	95	57
Assignment of errors	96	58
Bond	100	60
Clerk's certificate	101	61

1 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED, MILLIE G. REED, His Wife; Hiram H. Henderson, and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants. } Amended Complaint.

Come now the plaintiffs above named and by leave of court first had and obtained make and file this their amended complaint in the above-entitled action, and for a first cause of action allege—

That heretofore, to wit, on the 27th day of *of* March, 1890, the plaintiffs were the owners, in possession, and entitled to the possession of the following-described real estate, situate, lying, and being in Weber county, Utah Territory, to wit: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section.

That on said day the plaintiffs sold said real estate to the defendants Edward A. Reed and Hiram H. Henderson at and for
2 the price and sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars, and on said day said plaintiffs and their wives executed and delivered to said defendants, Edward A. Reed and Hiram H. Henderson, a warranty deed in the words and figures following:

Warranty Deed.

Louis B. Adams, Louisa M. Adams, his wife, and Watson N. Shilling and Angie Shilling, his wife, grantors, of Ogden City, Weber county, Utah Territory, hereby convey and warrant to Edward A. Reed and Hiram S. Henderson, grantees, of Ogden City, Weber county, Utah Territory, for the sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory:

An undivided two-thirds ($\frac{2}{3}$) of the east half ($\frac{1}{2}$) of section nine (9), township six (6) north of range two (2) west of the Salt Lake meridian.

Also an undivided two-thirds ($\frac{2}{3}$) of the south half of the southwest quarter of said section, and also an undivided two-thirds ($\frac{2}{3}$) of the northeast quarter of the southwest quarter of said section.

Witness the hands of the said grantors this twenty-seventh (27) day of March, A. D. 1890.

LOUIS B. ADAMS.
WATSON N. SHILLING.
ANGIE SHILLING.
LOUISA M. ADAMS.

Signed in the presence of—
FRED A. VOIGHT.

Which deed was duly witnessed, acknowledged, and certified, so as to entitle it to be recorded, and the same was on said 27th day of March, 1890, duly recorded in the office of the county recorder of Weber county, Utah Territory, in Book 5 of Deeds, at page 511.

3 That by said deed the plaintiffs intended to convey to said defendants, Edward A. Reed and Hiram H. Henderson, the real estate hereinbefore described, but by the mistake of the person who prepared the deed the said property was mistakenly described as being in township six (6) instead of township five (5) north of range two west of the Salt Lake meridian.

That the defendants Edward A. Reed and Hiram H. Henderson, immediately upon the execution and delivery of the deed hereinbefore set out, took possession of the real estate hereinbefore described and ever since have remained in possession thereof.

That the plaintiffs, so soon as they discovered the mistake in said deed hereinbefore set out, in the description of the property intended to be granted thereby, to wit, on the 27th day of September, 1891, made a certain other deed, executed by themselves and their wives, in the word- and figures following:

Quitclaim Deed.

Louis B. Adams and Louisa M. Adams, his wife; Watson N. Shilling and Angie Shilling, his wife, grantors, of Ogden City, Weber county, Utah Territory, hereby convey and quitclaim unto Edward A. Reed and Hiram H. Henderson, grantees, of Ogden City, Weber county, Utah Territory, for the sum of seventy-three hundred thirty-three and $\frac{34}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section.

4 Said grantors hereby covenant and agree to and with the said grantees that the said property was on the 27th day of March, A. D. 1890, free of all incumbrances of whatsoever description, and that said grantors were then seized in fee-simple of said property; and they further covenant and agree to and with the said

grantees that they have not since the said day encumbered or transferred the title of said property to any person whomsoever.

This deed is made to correct a certain deed made by said grantors to said grantees on the 27th day of March, 1890, in which deed the description of said property read "township six" instead of "township five," when it was the intention of all the parties to said deed that it should read township five instead of township six.

Witness the hands of said grantors this 29th day of September, 1891.

LOUIS B. ADAMS.
W. N. SHILLING.
ANGIE SHILLING.
LOUISA M. ADAMS.

Witness:
J. N. KIMBALL.

Which deed was duly witnessed, acknowledged, and certified, so as to entitle it to be recorded, and on said day the plaintiffs tendered said deed and the sum of $1.50, the recorder's fee for recording the same, to said defendants, Edward A. Reed and Hiram H. Henderson, and which deed the plaintiffs bring into court for said defendants.

That said last deed was made for the purpose and with the intent to correct the mistake in the description in the first deed herein set out.

That at the time of the execution of said first deed herein set out it was the intention of the plaintiffs and of the defendants Edward A. Reed and Hiram H. Henderson that the said deed should convey the property hereinbefore first described and in the second deed herein set out and described.

That at the time of the sale of said real estate by plaintiffs to defendants, and at the time of the execution and delivery of the deed hereinbefore first set out, the said defendants, Edward A. Reed and Hiram H. Henderson, paid of said purchase price the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash, and as for the remainder of the purchase price made their two certain promissory notes, bearing date at Ogden, Utah, March 26th, 1890, in the words and figures following:

$2,444.44. OGDEN, UTAH, *March 26th*, 1890.

On the 25th day of September, 1890, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred and forty-four $\frac{44}{100}$ dollars, at the Utah National Bank of Ogden, Utah, payable in U. S. gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.

Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON.

6 $2,444.45. OGDEN, UTAH, *March 26th*, 1890.

On the 26th day of March, 1891, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred forty-four $\frac{45}{100}$ dollars, at the Utah National Bank of Ogden, Utah, payable in gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.

Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON.

and then and there delivered said promissory notes to the plaintiffs.

That at the time of the delivery of the deed hereinbefore first set out and the delivery of the said promissory notes to the plaintiffs the said defendants, Edward A. Reed and Hiram H. Henderson, to secure the payment of said promissory notes and the interest thereon, as mentioned in the said promissory notes, according to the tenor thereof, did execute under their hands and deliver to the said plaintiffs a certain mortgage, bearing date of the 27th day of March, 1890, and conditioned for the payment of the said sums evidenced by the said promissory notes, and interest thereon at the rate and at the time and in the manner specified in said notes and according to the conditions thereof; which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 29th day of March, 1890, duly recorded in the office of the recorder of the county of Weber, Territory of Utah, in Book "O" of Mortgages, at page 314; which mortgage was in the words and figures following:

7 *Mortgage.*

Edward A. Reed and Millie G. Reed, his wife, and Hiram H. Henderson (unmarried), mortgagors, of Ogden City, Weber county, Utah Territory, hereby mortgages to Louis B. Adams and Watson N. Shilling, mortgagees, of Ogden City, Weber county, Utah Territory for the sum of forty-eight hundred and eighty-eight and $\frac{89}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory:

An undivided two-thirds of the east half of section nine, township six north of range two west of the Salt Lake meridian.

Also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of said southwest quarter.

This mortgage is given to secure the following indebtedness, to wit, two certain promissory notes of even date herewith, made by Edward A. Reed and Hiram Henderson, payable to L. B. Adams and W. N. Shilling or order, each for the sum of $2,444.44 and payable respectively on September 26th, 1890, and March 26th, 1891, with interest at the rate of eight per cent. per annum, interest pay-

able semi-annually. The above notes are given as part purchase price of above land.

The mortgagors agree to pay all taxes and assessments on said premises and the sum of $488.00 *dollars* attorneys' fees in case of foreclosure.

Witness the hands of the said mortgagors this twenty-seventh day of March, A. D. 1890.

EDWARD A. REED.
H. H. HENDERSON.

Signed in the presence of—
R. P. HUNTER.

That in said mortgage the property to be mortgaged was erroneously and by mistake described as lying in township (6) six north of range two (2) west of the Salt Lake meridian, when
8 it should have been described as lying in township five north of range two west of the Salt Lake meridian.

That said mistake was made by following the description in said mortgage that was given in the deed hereinbefore first set out.

That it was the intention of the defendants to mortgage to plaintiffs, and of plaintiffs to receive the mortgage upon the real estate in this complaint first above described and in the second deed herein set out described.

That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said — duly made and entered an order appointing the defendant George H. Burgitt guardian of the person and estate of the said defendant, Edward A. Reed, and he, the said defendant, George H. Burgitt, accepted the said appointment, and on the 22nd day of December duly qualified as such guardian, and the said George H. Burgitt is now such guardian of said defendant, Edward A. Reed.

Second. The said plaintiffs, further complaining against the said defendants, and for a second cause of action allege—

That heretobefore, to wit, at Ogden, Utah, on the 26th day of March, 1890, the defendants Edward A. Reed and Hiram H. Henderson made two certain promissory notes in writing in the words and figures following:

"$2,444.44 OGDEN, UTAH, *March 26th*, 1890.

On the 26th day of September, 1890, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred and forty-four $\frac{44}{100}$ dollars, at the Utah National Bank of Ogden, Utah, payable in U. S. gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.
9 Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON.

$2,444.45. OGDEN, UTAH, *March 26th*, 1890.

On the 26th day of March, 1891, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred and forty-four $\frac{45}{100}$ —, at the Utah National Bank of Ogden, Utah, payable in U. S. gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.

Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON."

and then and there delivered said promissory notes to the plaintiffs.

That to secure the payment of the said promissory notes and interest thereon, as mentioned in said promissory notes, according to the tenor thereof, the said defendants, Edward A. Reed and Hiram H. Henderson, did execute under their hands and delivered to the said plaintiffs a certain mortgage bearing date the 27th day of March, 1890, and conditioned for the payment of the said sums evidenced by said promissory notes and the interest thereon at the rate and at the time and in the manner specified in said notes, and according to the conditions thereof; which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 29th day of March, 1890, duly recorded in the office of the county recorder of Weber county, Utah Territory, in Book "O" of Mortgages, at page 314; which said mortgage is the same mortgage set out in the first cause of action of this amended complaint and is the same mortgage for which reformation is asked by the first cause of action of this complaint, and which said mortgage is hereby referred to as a part of *of* this cause of action.

That the interest on the said principal sums mentioned in said promissory notes and in said mortgage has been paid down to September 26th, 1890, and nothing more has been paid thereon.

That on the 26th day of September, 1891, there was due on said notes and mortgage the sum of five thousand two hundred and eighty-seven and $\frac{75}{100}$ dollars; which sum, together with interest thereon, at the rate of eight per cent. per annum, from the 26th day of September, 1891, is still due and wholly unpaid.

That the plaintiffs are now the legal owners and holders of said promissory notes and mortgage, and the defendants Edward A. Reed and Hiram H. Henderson are still the owners of the real estate in this amended complaint first above described.

That on June 26th, 1891, the defendants Edward A. Reed and Hiram H. Henderson made and delivered to the Utah National Bank of Ogden, Utah, which was then the holder of said promissory notes, their certain promissory note for the sum of three hundred and ninety-one and $\frac{10}{100}$ dollars, whereby they or either of them promised to pay, on demand, to the Utah National Bank of Ogden, Utah, the sum of three hundred and ninety-one and $\frac{10}{100}$ dollars, with interest thereon, at the rate of twelve per cent. per annum, from

date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection; which note was to be in full payment of the interest of the said notes and mortgage.

That said note was never paid, and that plaintiffs are now the owners and holders thereof and herewith bring the same into court for the said defendants, Edward A. Reed and Hiram H. Henderson.

11 That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said day duly made and entered an order appointing George H. Burgitt guardian of the person and estate of the said defendant, Edward A. Reed, and the said defendant, George H. Burgitt, accepted the said appointment, and on the 22nd day of December duly qualified as such guardian, and on the last-mentioned day said probate court duly issued letters of guardianship to the said defendant, George H. Burgitt, as such guardian, and the said George H. Burgitt is now such guardian of the said defendant, Edward A. Reed.

That the defendant Millie G. Reed has or claims to have some interest in or claim upon said real property in this amended complaint first described, or some part thereof, as the wife of the said defendant, Edward A. Reed, which interest or claim is subsequent to and subject to the lien of the mortgage of plaintiffs.

Wherefore plaintiffs pray judgment against the said defendants:

First. That the mortgage in said amended complaint mentioned be reformed and corrected so as to describe the property in this amended complaint first described.

Second. That the usual decree may be made for the sale of the following tracts of land situate in Weber county, Utah Territory: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section; also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, by the United States marshal in and for the Territory of Utah, according to law and the practice of this court; that the proceeds of said sale may be applied,

12 first, in payment of the expenses and costs of said sale; second, the costs of this action; third, to the payment of the attorneys' fees fixed by said notes and mortgage; fourth, to the amounts due the plaintiffs on said promissory notes for principal and interest; and that said defendants and all persons claiming under them or either of them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in said premises and every part thereof, and that the said plaintiffs have judgment and execution against the said defendants, Hiram H. Henderson and Edward A. Reed, and against the estate of the said Edward A. Reed in the possession and under the control of said defendant, George H. Burgitt, as guardian aforesaid,

for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable thereto to the satisfaction of the sums due on said notes and mortgage, and costs and expense of sale and attorneys' fee.

Third. That the plaintiffs or any other party to the suit may become a purchaser at said sale; that the marshal, after the time allowed for redemption shall have expired, execute a deed to the purchaser; that the said purchaser be let into possession of the said premises upon the production of the marshal's deed therefor, and that the plaintiffs may have such other or further relief in the premises as to this court may seem meet and equitable.

KIMBALL AND ALLISON,
Attorneys for Plaintiffs.

TERRITORY OF UTAH, }
County of Weber, } ss:

Louis B. Adams, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing amended complaint; that the same is true of
13 his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

LOUIS B. ADAMS.

Subscribed and sworn to before me this 16th day of April, 1892.

[NOTARIAL SEAL.]

J. T. SMITH,
Notary Public.

14 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. Reed, His Wife; Hiram H. Henderson and George H. Burgitt, Gaurdian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.
} Answer to Amended Complaint.

Come now the defendants in the above-entitled action and, in answer to plaintiffs' first cause of action as set forth in the amended complaint, allege—

That they have no information or belief sufficient to enable them to answer the allegations in the plaintiffs' amended complaint as to whether the plaintiffs on the 27th day of March, 1890, or at any other time were the owners, in the possession of, or entitled to the possession of the following-described real estate situate, lying, and being in Weber county, Utah Territory, to wit: An undivided two-

thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, and therefore and upon this ground
15 these defendants deny that said plaintiffs on the 27th day of March, 1890, or at any other time were the owners and in the possession and entitled to the possession of the above-described real estate.

Deny that said plaintiffs sold the above-described real estate or any part of the same to Edward A. Reed and Hiram H. Henderson for the price of seven thousand three hundred and thirty-three and $\frac{34}{100}$ dollars or for any other sum or at all.

Admit that the plaintiffs executed the warranty deed which is set out in the plaintiffs' first cause of action and which is duly witnessed, acknowledged, and recorded in the office of the county recorder of Weber county, Utah Territory.

Deny that by said deed the plaintiffs intended to convey to the defendants Edward A. Reed and Hiram H. Henderson or either of them the real estate which is first set out in the plaintiffs' first cause of action or any part of the same or at all.

Deny that the defendants Edward A. Reed and Hiram H. Henderson have ever or at any time or at all been in the possession of said real estate or any part of the same or at all.

And the defendants, further answering said amended complaint, allege that they have no information or belief sufficient to enable them to answer the paragraph in the plaintiffs' amended complaint which reads as follows:

"That the plaintiffs, so soon as they discovered the mistake made in said deed hereinbefore set out, in the description of the property intended to be granted thereby, to wit, on the 29th day of September, 1891, made a certain other deed, executed by themselves and their wives, in the words and figures following:

Quitclaim Deed.

Louis B. Adams and Louisa M. Adams, his wife; Watson N. Shilling and Angie Shilling, his wife, grantors, of Ogden City,
16 Weber county, Utah Territory, hereby convey and quitclaim unto Edward A. Reed and Hiram H. Henderson, grantees, of Ogden City, Weber county, Utah Territory, for the sum of seven thousand three hundred and thirty-three and $\frac{34}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section.

Said grantors hereby covenant and agree to and with the said grantees that the said property was, on the 27th day of March, A. D. 1890, free and clear of all incumbrances of whatsoever description,

and said grantors were then seized in fee-simple of said property, and they further agree and covenant to and with the said grantees that they have not since the said day incumbered or transferred the title of the said property to any person whomsoever.

This deed is made to correct a certain other deed, made by said grantors to said grantees on the 27th day of March, 1890, in which deed the description of said property read township six instead of township five, when it was the intention of all the parties to said deed that it should read township five instead of six.

Witness the hands of said grantors this 29th day of September, 1891.

LOUIS B. ADAMS.
W. N. SHILLING.
ANGIE SHILLING.
LOUISA M. ADAMS.

Witness:
J. A. KIMBALL.

Which deed was duly witnessed, acknowledged, and certified so as to entitle it to be recorded, and on said day tendered said
17 deed and the sum of $1.50, the recorder's fee for recording the same, to said defendants, Edward A. Reed and Hiram H. Henderson, and which deed plaintiffs bring into court for said defendants; that said last deed was made for the purpose and with the intention to correct a mistake in the description in the first deed herein set out; that at the time of the execution of said first deed herein set out it was the intention of the plaintiffs and the defendants Edward A. Reed and Hiram H. Henderson that the said deed should convey the property hereinbefore first described and in the second deed herein set out and described;" and therefore and upon this ground these defendants deny that said plaintiffs executed the alleged quitclaim deed; deny that said quitclaim deed was made for the purpose and with the intention to correct the mistake in the description of the first deed set out in plaintiffs' first cause of action; deny that at the time of the execution of the first deed in plaintiffs' first cause of action set out that it was the intention of the plaintiffs or either of them and the defendants Edward A. Reed and Hiram H. Henderson or either of them that said deed should convey the property first described in the plaintiffs' first cause of action or any part of the same or at all.

Defendants admit that at the time of the execution of the deed first set out in plaintiffs' first cause of action the defendants Edward A. Reed and Hiram H. Henderson paid the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash to the plaintiffs and executed their certain promissory notes for the sum of two thousand four hundred and forty-four and $\frac{45}{100}$ dollars each, and also executed a mortgage upon the land described in said mortgage, and which is fully set out in plaintiffs' first cause of action, to secure the payment of said notes.

18 And defendants, further answering the plaintiffs' amended complaint, allege that they have no information or belie

sufficient to enable them to answer the allegations of the plaintiffs' amended complaint as to whether the property described in said mortgage was erroneously and by mistake described as lying in township six north of range two west of the Salt Lake meridian when it should have been described as lying in township five north of range two west of the Salt Lake meridian, or whether the said mistake was made by following the description in said mortgage that was given in the deed, or whether it was the intention of the defendants or either of them to mortgage to the plaintiffs or of the plaintiffs to receive the mortgage upon the real estate first described in plaintiffs' first cause of action, and therefore and upon this ground these defendants deny that said property first described in the mortgage was erroneously and by mistake described, as set forth in plaintiffs' first cause of action, and deny that said first alleged mistake was made by following the description of the deed set out in plaintiffs' first cause of action, and deny that it was the intention of the defendants or either of them and the plaintiffs or either of them to mortgage any property at all except as set forth in said mortgage.

Second.

And the defendants, in answer to plaintiffs' second cause of action, as set forth in plaintiffs' amended complaint, admit that the defendants Edward A. Reed and Hiram H. Henderson on the 26th day of March, 1890, made and executed their two certain promissory notes in writing, one for the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, and one for the sum of two thousand four hundred forty-four and $\frac{45}{100}$ dollars, to Louis B. Adams and Watson N. Shilling, which became due in six months and one year after date, respectively; an- defendants further admit that the said defendants, Edward A. Reed and Hiram H. Henderson, made and executed a certain mortgage, as set forth in plaintiffs' second cause of action, to secure said notes, but these defendants deny that on the 26th day of September, 1891, or at any other time there was due on said notes and mortgage the sum of five thousand two hundred eighty-seven and $\frac{77}{100}$ dollars or any sum whatever or at all, for the reason that said notes and mortgage were obtained by fraud and misrepresentation on the part of the plaintiffs, Louis B. Adams and Watson N. Shilling, and which is hereafter more fully set out.

19

As to the allegations that "the plaintiffs are now the lawful owners and holders of said notes and mortgage," these defendants say that they have no information or belief sufficient to enable them to answer the said allegations, and therefore and upon this ground deny that said plaintiffs are now the owners and entitled to the possession of said notes and mortgage or either of them or at all.

And the defendants Edward A. Reed and Hiram H. Henderson deny that they are still the owners of the real estate first set forth in this amended complaint or ever have been such owners or at all.

Defendants deny that Millie G. Reed claims or ever has claimed

any right, title, or interest to the real property first described in the plaintiffs' first cause of action or any part thereof or at all.

And the defendants, further answering plaintiffs' amended complaint and as a further answer thereto, allege that on or about the 27th day of March, 1890, plaintiffs, Louis B. Adams and Watson N. Shilling, represented to the defendants Edward A. Reed and
20 Hiram H. Henderson that they owned and had a good title in fee-simple to four hundred and forty acres of land lying west of Ogden City about three and one-half miles; that the defendants Edward A. Reed and Hiram H. Henderson, relying upon and believing and acting upon the representations of said plaintiff and without investigating the title of said land, and also without seeing said land, purchased an undivided two-thirds interest of said four hundred and forty acres for the sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars and received the alleged warranty deed as first set out in plaintiffs' first cause of action; that of said sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars they paid the plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash and executed their two certain promissory notes for the two thousand four hundred forty-four and $\frac{45}{100}$ dollars each, bearing 8 % interest and payable in six months and one year from March 26th, 1890, which said notes were secured by a mortgage bearing the same date as said notes and upon the land first described in the warranty deed in the plaintiff amended complaint, and that said mortgage was duly signed, witnessed, and acknowledged; and that the defendants Edward A. Reed and Hiram H. Henderson, relying upon and fully believing and acting upon the repr-sentations of plaintiffs that they, the plaintiffs, were seized of a good and indefeasible estate in fee-simple of the above-described land, paid the interest on said notes, which amounted to the sum of one hundred and forty-four and $\frac{66}{100}$ dollars, down to and including September 26th, 1890; that they also executed their promissory note on the 26th day of June, 1891, payable to the Utah National Nank of Ogden, for the sum of three hundred and ninety-one and $\frac{10}{100}$ dollars, as the interest on said notes hereinbefore described.

That thereafter, and before the filing of the complaint in this action, defendants Edward A. Reed and Hiram H. Hender-
21 son ascertained and now allege that the plaintiffs were not the owners of and did not have a good and indefeasible estate in fee-simple to the said land first described in the plaintiffs' warranty deed to them, which deed is fully set out in the plaintiffs' first cause of action, or any title at all, and that no title *waht*soever in or to said lands was conveyed to said Reed and Henderson.

That thereupon the defendants Reed and Henderson demanded back from said plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, with interest from March 27th, 1890, at the rate of eight per cent. per annum, to November 10th, 1890; and also interest on two thousand six hundred twenty-four and $\frac{74}{100}$ — from November 10th, 1890, at the rate of eight per cent. per annum; and also the two notes of two thousand four hundred forty-four

and $\frac{45}{100}$ dollars each, and bearing date of March 27th, 1890, and becoming due in six months and one year respectively after date; and also one note of three hundred ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, and becoming due on demand, by surrendering and delivering up the same to them, the said Edward A. Reed and Hiram H. Henderson.

These defendants further allege that the representations of the plaintiffs in regard to the ownership of said land, that they, the plaintiffs, had a good and indefeasible estate in fee-simple, were false and fraudulent, and that the plaintiffs did then and there know that such representations and allegations were false and fraudulent; that they did not have at that time, or at any time, such a title as represented.

That these defendants, Edward A. Reed and Hiram H. Henderson, relied upon and fully believed and acted upon such allegations and representations of the said plaintiffs, and did purchase and pay for said land the price above specified, and that such representations were untrue and false, and that the plaintiffs then and there
22 knew that such representations were false and fraudulent and untrue and were made to deceive the defendants, and that the plaintiffs did not have a good and indefeasible estate in fee-simple of said land or any title whatever to said land; and defendants further allege that if the representation of the plaintiffs had in fact been true, that the defendants Edward A. Reed and Hiram H. Henderson could have sold said land long since for a much higher price than they paid for the same, and that they have been damaged by such false and fraudulent representations in the sum of seven thousand dollars.

Defendants further allege that the plaintiffs have not now or at any time or at all have had a good and indefeasible estate in fee-simple to the property first described in the plaintiffs' first cause of action, or to the property first described in the first deed as set forth in said first cause of action of said amended complaint.

Wherefore these defendants pray that this cause be dismissed as against them, together with their costs.

Cross-complaint.

And the said defendants, by way of cross-complaint against the said plaintiffs, Louis B. Adams and Watson N. Shilling, complain and allege—

That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said day duly made and entered an order appointing the defendant George H. Burgitt, who is plaintiff in this cross-complaint, guardian of the person and estate of said defendant, Edward A. Reed, and he, the said defendant, George H. Burgitt, accepted the said appointment and on the 22nd day of December duly qualified as such guardian, and on the last mentioned day said probate court duly issued letters of guardianship

to the *the* defendant George H. Burgitt as such guardian,
23 and the said George H. Burgitt is now such guardian.

That on or about the 27th day of March, 1890, the plaintiffs, Louis B. Adams and Watson N. Shilling, represented to the defendants Edward A. Reed and Hiram H. Henderson that they owned and had a good title in fee-simple to four hundred and forty acres of land lying west of Ogden City about three and one-half miles.

That the defendants Edward A. Reed and Hiram H. Henderson, relying upon and believing and acting upon the representations of said plaintiffs, and without investigating the title of said land, and also without seeing said land, purchased an undivided two-thirds interest for the sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars, and received the alleged warranty deed as first set out in the plaintiffs' first cause of action, which land is described as follows in said deed:

An undivided two-thirds of the east half of section nine (9), township six (6) north of range two (2) west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section; also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, in Weber county, Utah.

That of said sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars they paid the plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash and executed their two certain promissory notes for the sum of two thousand four hundred forty-four and $\frac{45}{100}$ dollars, each bearing interest at 8 %, payable in six months and one year from March 26th, 1890, which said notes were secured by a mortgage, bearing the same date of said notes, upon the land as first described in the warranty deed first set out in the plaintiffs' first cause of action, which said land has hereinbefore been fully described.

24 That said mortgage was duly signed, witnessed, and acknowledged; that the defendants Edward A. Reed and Hiram H. Henderson, relying upon and fully believing and acting upon the representations of plaintiffs, that they, the plaintiffs, were seized of a good and indefeas*a*ble estate in fee-simple of the above-described land, paid the interest on said notes, which amounted to the sum of one hundred forty-four and $\frac{66}{100}$ dollars, down to and including September 26th, 1890; that they also executed their promissory note on June 26th, 1891, payable to the Utah National Bank of Ogden, for the sum of three hundred ninety-one and $\frac{10}{100}$ dollars, as the interest on said notes hereinbefore described.

That thereafter and before the filing of the cross-complaint in this action the defendants Edward A. Reed and Hiram H. Henderson ascertained and now allege that the plaintiffs were not the owners of and did not have a good and indefeas*a*ble estate in fee-simple of said land first described in plaintiffs' deed to them, or any title at all, and that no title whatever in or to said land was conveyed to said Reed and Henderson.

That thereupon the defendants Edward A. Reed and Hiram H.

Henderson demanded back from said plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, with interest thereon from March 27th, 1890, at the rate of eight per cent. per annum, to November 10th, 1890, and also interest on two thousand six hundred twenty-four and $\frac{74}{100}$ dollars from November 10th, 1890, at the rate of eight per cent. per annum, and also the two notes of two thousand four hundred forty-four and $\frac{45}{100}$ dollars each and bearing date of March 27th, 1890, and becoming due in six months and one year respectively, and also one note of three hundred ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, and becoming due on demand, by surrendering and delivering the same up to them, the said Edward A. Reed and Hiram H. Henderson, which said plaintiffs refused to do.

25 These defendants further allege that the representations of the plaintiffs in regard to the ownership of the said land, that they, the plaintiffs, had a good and indefeasible estate in fee-simple, were false and fraudulent, and that the plaintiffs did then and there know that such representations were false and fraudulent and untrue and were made to deceive these defendants; that they did not have at that time or at any time since such a title as represented; that these defendants, Edward A. Reed and Hiram H. Henderson, relied upon and fully believed and acted upon such allegations and representations of said plaintiffs and did purchase and pay for said land the price above specified, and that such representations and allegations were untrue and false, and that the plaintiffs did not have a good and indefeasable estate in fee-simple of said land or any title whatever to said land; and the defendants further allege that if the representations of the plaintiffs had in fact been true, that the defendants Edward A. Reed and Hiram H. Henderson could have sold said land long since for a much higher price than that paid for the same, and that they have been damaged by such false and fraudulent representations of the plaintiffs in the sum of seven thousand dollars.

Defendants further allege that the plaintiffs have not now or at any time or at all had a good and indefeasable estate in fee-simple of the property first described in plaintiffs' complaint, and which is first described in this cross-complaint, or property described in the first deed of said plaintiffs' complaint.

26 Wherefore these defendants pray that the above mortgage and notes be cancelled and delivered up to the defendants Edward A. Reed and Hiram H. Henderson; that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the person and estate of Edward A. Reed, a person incapable of conducting his own affairs, recover of the said plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, with interest on same from March 27th, 1890, to November 10th, 1890, at the rate of eight per cent. per annum, and also interest on two thousand six hundred and twenty-four and $\frac{74}{100}$ dollars from November 10th, 1890, and also costs of suit and seven thousand dollars damages.

And the defendants pray for such other and further relief as to this court may seem meet and equitable.

BROWN & HENDERSON,
Attorneys for Defendants.

TERRITORY OF UTAH, } ss:
County of Weber, }

Hiram H. Henderson, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and cross-complaint to the amended complaint of the plaintiffs herein, and that the same is true of his own personal knowledge except as to those things therein stated on information and belief, and as to those matters he believes it to be true.

H. H. HENDERSON.

Subscribed and sworn to before me this 30th day of June, 1892.

____ ____,
Notary Public.

27 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
E. A. REED & H. H. HENDERSON *et al.*, Defendants. } Stipulation.

It is hereby stipulated between the parties to the above-entitled action that all the allegations in the cross-complaint of the defendants are hereby denied without filing an answer thereto; and it is further stipulated and agreed that the allegations in defendants' answer and cross-complaint are sufficient to put in issue any defect or defects in plaintiffs' title to part or all the real estate described in plaintiffs' amended complaint that may now or have heretofore existed against the same, and all proper evidence may be introduced by either the plaintiffs or defendants either in support or in derrogation of said title, notwithstanding the defects to said title may not have *neen* specifically pleaded in the answer and cross-complaint.

BROWN & HENDERSON AND
H. H. HENDERSON,
Attorneys for Defendants.
JAMES N. KIMBALL AND
E. M. ALLISON, JR.,
Attorneys for Plaintiffs.

Dated June 6th, 1894.

28 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

Fourth District Court, Utah.

Filed July 21, 1894. K. S. Boreman, Clerk.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.

To the court:

The undersigned, special master in chancery and referee in the above-entitled action, herewith transmits his findings of fact and conclusions of law in said cause, together with form of decree, and he reports that the attorneys upon both sides agreed, and their agreement was entered by the stenographic reporter in the minutes of the proceedings, that the referee should have and be entitled to twenty-five dollars for the first day and fifteen dollars for each succeeding day in which he was engaged in the hearing of said cause; that the hearing, including the time of making the findings, occupied at least two days. His fees thereby are forty dollars.

Respectfully submitted.

JACOB S. BOREMAN,
Special Master in Chancery and Referee.

July 21st, 1894.

29 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.

Finding of Facts and Conclusions of Law.

On motion of James N. Kimball, Esq., attorney for the plaintiffs, and by consent of H. H. Henderson, Esq., attorney for defendants, and pursuant to law in that behalf, it is ordered that this cause be, and it is hereby, referred to Jacob S. Boreman, Esq., as a special master in chancery, to try, *and* and all issues, whether of law or fact, and make findings of fact and conclusions of law and a form of decree, and make due report thereof to the court.

JAMES A. MINER, *Judge.*

Dated June 23rd, 1894.

Upon the authority of the above and foregoing order of the court and by agreement of the parties, this cause came on regularly to be heard the second day of July, A. D. 1894, before the above-named Jacob S. Boreman, special master in chancery, upon the
30 amended complaint, filed therein on the 16th day of April, 1892, and the answer and cross-complaint, filed June 3rd, 1892, and upon the stipulation of the parties, filed June 6th, 1894, Messrs. Kimball and Allison appearing for the plaintiffs and H. H. Henderson, Esq., and Messrs. Richards and Macmillan for the defendants; whereupon oral and documentary evidence and agreements made and entered of record before said special master in chancery, Jacob S. Boreman, were introduced by the respective parties in support of the allegations of their pleadings, and from the evidence and stipulations introduced said special master finds the following facts, to wit:

I.

That on March —, 1890, the defendants Edward A. Reed and Hiram H. Henderson inquired of the plaintiffs, Watson N. Shilling and Louis B. Adams, as to whether they owned and had a good title to a tract of land west of Ogden City, Weber county, Utah Territory, and that said Watson N. Shilling and Louis B. Adams then and there informed said Reed and Henderson that they owned and had a good title in fee-simple to four hundred and forty acres of land lying west of Ogden City about three and one-half miles.

II.

That the tract of land referred to in finding "I," and which said plaintiffs said they owned and to which they said they had a good title in fee-simple, is described as follows:

The east half of section nine, township five north of range two west of the Salt Lake meridian; the south half of the southwest quarter of said section, and the northeast quarter of the southwest quarter of said section.

III.

31 That the defendants Edward A. Reed and Hiram H. Henderson had not seen the land and were not acquainted with the title, but that plaintiffs promised that they would furnish said Reed and Henderson with an abstract of title to said land; that the defendants Reed and Henderson relied upon and believed and acted upon the representations of the said plaintiffs that they had a good and indefeasable estate in fee-simple to the same, and without investigating the title of said land purchased an undivided two-thirds interest in four hundred and forty acres for the sum of seven thousand three hundred and thirty-three and $\frac{32}{100}$ dollars, one-third of which, to wit, two thousand four hundred and forty-four and $\frac{44}{100}$ dollars, was to be paid in cash, and time was given for the payment of the residue, with interest; which purchase of said land the defendants would not have made if they had not believed the rep-

resentations of the plaintiffs that they had a good and indefeasible title to said land; that the representations made by said Adams and Shilling as aforesaid to said Reed and Henderson were untrue.

IV.

That on the 27th day of March, 1890, Reed and Henderson received from Adams and Shilling a deed of general warranty of said last-named date for the following-described land:

An undivided two-thirds of the east half of section nine, township six north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, in Weber county, Utah.

V.

32 That the plaintiffs, by the deed mentioned in finding No. IV, intended to convey to defendants an undivided two-thirds of the land described in finding No. II, and defendants purchased and intended to purchase of plaintiffs an undivided two-thirds of the land described in finding No. II.

VI.

That by mistake of the scrivener who prepared said deed the land was described as lying in township six instead of township five north *or* range two west of the Salt Lake meridian.

VII.

That said defendants, Reed and Henderson, at the time of receiving said deed mentioned in finding No. 4, paid to the plaintiffs, Adams and Shilling, one-third of the purchase price of the land intended to be purchased, to wit, two thousand four hundred and forty four and $\frac{44}{100}$ dollars, of the purchase-money in cash, and executed their two certain promissory notes in favor of Adams and Shilling for the sum of two thousand four hundred and forty-four and $\frac{44}{100}$ dollars each, bearing eight per cent. interest and payable one year and six months from March 26, 1890; which said notes were secured by a mortgage back on the same land for the residue of the purchase-money; which land was also described in said mortgage, by mistake of the scrivener who prepared the same, as lying in township six instead of township five north of range two west of the Salt Lake meridian, when it was intended to be described as lying in said township five.

VIII.

That said mortgage was duly signed, witnessed, and acknowledged; that the defendants Edward A. Reed and Hiram H. Henderson relied upon and fully believed and acted upon the representa-
33 tions of plaintiffs that they, the plaintiffs, were seized of a good and indefeasible estate in fee-simple of the above-de-

scribed land and paid to Adams and Shilling the interest of said notes, which amounted to the sum of $180.00, down to and including September 26th, 1890; that they also executed their certain promissory note of June 26th, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, as the interest on said notes hereinbefore described, said bank being then and there the holder of said promissory notes first above mentioned.

IX.

That the note mentioned in finding No. VIII, as executed by defendants June 26th, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, was brought into court when plaintiffs filed their complaint in this action for defendants, and is still so in court for the defendants.

X.

That plaintiffs failed to furnish any abstract for any land whatever, and that defendants, having an opportunity to make a sale of the land in township five, said section and range, and which was the land intended to be conveyed by Adams and Shilling to Reed and Henderson, procured an abstract for themselves on the third of September, 1891, for the last-named land.

XI.

That the lands described in finding two are in Weber county, Utah, and are within ten miles of the line of the Union Pacific railroad, and are within the limit of lands granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862; that the lands in controversy are and have been heretofore used and cultivated as agricultural lands and lie in a valley at the base of the Wasatch mountains, and that no exploration nor examination has ever been made on said lands for coal or minerals of any kind or description.

34 XII.

That on April 16th, 1867, the Union Pacific Railroad Company conveyed to Cyrus H. McCormick and John Duff, as trustees, by way of mortgage, all the lands granted to it by the act of Congress approved July 1st, 1862, and the act amendatory thereof, approved July 2nd, 1864, to secure the payment of ten millions of dollars, and by said mortgage gave said trustees power and authority to release the lien created by said mortgage upon any particular tract or parcel of land upon the paying of the purchase price therefor.

And also gave power, in case of a vacancy happening in the number of trustees, to the remaining trustees to do all acts while said vacancy exists, and to have all the rights and exercise all the powers and discharge the duties devolving on the said trustees, and gave said remaining trustees power and authority to fill such vacancy; that on December 18th, 1873, the said Union Pacific Railway Com-

pany conveyed by way of mortgage to the Union Trust Company of New York all of its right, title, and interest in and to all the lands granted by the acts of Congress aforesaid, subject to the mortgage of McCormick and Duff, as aforesaid, with the same authority as to releasing as *are* stated above as contained in said mortgage to McCormick and Duff, as trustees, and further provided that the trustees under said first mortgage had power and authority to release the lien created by this mortgage by joining in deed with the Union Pacific Railroad Company.

XIII.

That on October 20th, 1873, John Duff appointed Frederick L. Ames trustee and a joint tenant in trust with himself to the lands described in the first mortgage mentioned in finding No. 12, to succeed Cyrus H. McCormick, who had resigned his position as trustee under the said mortgage.

35 XIV.

That the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee under the first mortgage described in finding No. 12, by warranty deed dated December 11th, 1883, and acknowledged June 16th, 1884, and recorded Feb. 4th, 1885, conveyed to William Van Dyke the northwest quarter of the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian, and said Frederick L. Ames being then and there the remaining trustee under said first mortgage, the other trustee, John Duff, having on February 14th, 1877, resigned his position as trustee under said first mortgage, and the said Ames by said conveyance released said last-described land from the lien of both mortgages described in finding 12. Said warranty deed reserved to said company so much of said land (if any) as is within 100 feet of the railroad and contained a condition for grantees to build fences on said land (if any) adjoining said railroad.

XV.

That on July 2nd, 1887, the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, as stated in the last finding, by warranty deed conveyed to John Selman the northeast quarter of the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian; that by said conveyance said Ames released said land from the lien of the two mortgages mentioned in finding No. 12, and that on January 22nd, 1886, William Van Dyke by warranty deed conveyed to the plaintiffs, Adams and Shilling, the northwest quarter of the northeast quarter of said section nine, township five north of range two west of the Salt Lake meridian, and that on September 27th, 1887, John Selman by warranty deed conveyed to Adams and Shilling the northeast quarter of the northeast quarter of said section; that the deed

in this finding first mentioned from the Union Pacific Rail-
36 road Company and Frederick L. Ames, trustee, to John Selman contained the same reservation of land within 100 feet of the railroad and the same conditions as to fences as were in the deed mentioned in finding No. 14.

XVI.

That on October 18, 1889, the Union Pacific Railroad Company and the Union Trust Company, trustee, by warranty deed conveyed to plaintiffs, Adams and Shilling, the south half of the northeast quarter, the east half of the southwest quarter, and the southeast quarter of section nine, township five north of range two west of the Salt Lake meridian, "reserving, however, to the said Union Pacific Railroad Company the exclusive right to prospect for coal and other miner-*las* within and underlying said lands, and to mine for and to remove the same if found, and for this purpose it shall have the right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor," and that on June 4th, 1888, the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, by warranty deed conveyed to the plaintiffs, Adams and Shilling, the southwest quarter of the southwest quarter of section nine, township five north of range two west of the Salt Lake meridian; that the said Union Trust Company in said conveyance of October 18th, 1889, purported to release the lands described in said conveyance and as described in this finding from the lien of both mortgages described in finding No. 12, subject only to the reservation contained in said deed, as herein set forth, and said Frederick L. Ames, remaining trustee by said conveyance of June 4th, 1888, purported to release the lands described therein and herein from the lien of both mortgages described in finding No. 12.

37 XVII.

That on July 2nd, 1889, Frederick L. Ames, by an instrument of that date, appointed the Union Trust Company of New York co-trustees with himself under the first mortgage mentioned in finding 12, and on July 13th, 1889, by an instrument in writing conveyed to the Union Trust Company of New York all his title as joint tenant in the property held by him under said first mortgage described in finding No. 12; which conveyance was accepted by said Union Trust Company, and on July 15th, 1889, the said Ames resigned his place as trustee under the said first mortgage described in finding No. 12.

XVIII.

That no patent has ever issued from the Government for the land intended to be conveyed by Adams and Shilling to said Reed and Henderson in township five, section nine north of range two west, of the Salt Lake meridian; that the plaintiffs did not hold under patent and plaintiffs had no title to the land described in the deed

made by them to said Reed and Henderson for the land mentioned in finding 4, and land described in finding 4 was not the land intended to be conveyed; that the parties who had applied to Reed and Henderson for the purchase of the land described in finding 2 declined and refused to buy and the sale was defeated.

XIX

That within two days of the third day of September, 1891, and before the bringing of this action by plaintiffs, the defendants Edward A. Reed and Hiram H. Henderson ascertained that the plaintiffs were not the owners of and had no title whatever in or to said land which said deed from plaintiffs purported to convey to these defendants; that the deed that Adams and Shilling had given to these defendants purported to convey land in section nine and township six north of range two west of the Salt Lake me-
38 ridian, and which was never owned by plaintiffs, and that the land intended to be conveyed was located in township five, in said section nine and said range two.

XX.

That on or about the 4th day of September, 1891, the defendants Edward A. Reed and Hiram H. Henderson notified said Adams and Shilling that they (Reed and Henderson) rescinded said contract of sale, and they demanded back from said plaintiffs the sum of two thousand four hundred and forty-four and $\frac{44}{100}$ dollars, with interest thereon from March 27th, 1890, at the rate of eight per. cent per annum, and also interest on two thousand six hundred and twenty-four and $\frac{74}{100}$ dollars from November 10th, 1890, at the rate of eight per cent. per annum, and also the two notes of two thousand four hundred and forty-four and $\frac{45}{100}$ dollars each, bearing date of March 27th, 1890, and also one note of three hundred and ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, all of which said notes had been returned by said bank to Adams and Shilling, and demanded the surrender and delivery of the same to them.

XXI.

That after Reed and Henderson had notified Adams and Shilling that they (Reed and Henderson) rescinded said contract of sale, and before the bringing of this action, Adams and Shilling tendered another deed to them, a special warranty deed, but which contained a proper description of the land intended to be conveyed, and which deed Reed and Henderson refused to receive, saying that they (Reed and Henderson) rescinded the contract of sale; that Adams and Shilling did not have a good title to the land that was described in said last deed, and also that the deed was not one of general warranty; that said deed was dated on September 29th, 1891, and at the time of its tender one dollar and fifty cents were tendered to pay for the recording.

39 XXII.

That at the time, to wit, September 29th, 1891, that Adams and Shilling tendered the deed for the land described as follows: "The northeast quarter, the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section nine, in township five north of range two west of the Salt Lake meridian, United States survey," to Reed and Henderson the title to the land was so incumbered by reservation in the Union Pacific Railway Company deed of date October 8th, 1889, to Adams and Shilling, which reads as follows: "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land, and to mine for and remove the same, if found, and for this purpose it shall have the right of way over and across said lands and space necessary for the conduct of said business thereon without charge or liability or damage therefor."

XXIII.

That the Union Pacific Railroad Company executed and delivered to the plaintiffs a quitclaim deed dated November 2nd, 1891, and acknowledged on the 17th day of November, 1891, and duly recorded on the 8th day of January, 1892, releasing the land intended to be conveyed from the claim of the said company on coal, under the coal reservation in the deed specified in finding XXII.

XXIV.

That the plaintiffs in this action rely for their title upon an act of Congress of July 1st, 1862, and the act amendatory thereto, under which the land in controversy (and which is described in the quitclaim deed from Adams and Shilling of September 29th, 1891, to Reed and Henderson), with other lands, were granted to the Union Pacific Railway Company.

40 XXV.

The plaintiffs base their claim of title to the property intended to be conveyed, and which is described in finding 2, upon the conveyances and instruments in writing introduced in evidence by them; that said lands described in finding 2 have never been patented by the United States of America to the Union Pacific Railroad Company, under which plaintiffs claim, and no patent is of record in Weber county, Utah Territory; that all of said lands are situated in Kanesville precinct, five or six miles from Ogden City.

XXVI.

That on the 28th day of March, 1890, the defendants Reed and Henderson let, leased, and demised unto the plaintiffs, Adams and Shilling, who were occupying said lands, for the term of six months

from said date, an undivided two-thirds of the lands described in finding No. 2; that defendants never actually occupied any of said land.

XXVII.

That neither of the notes described in the amended complaint and in the mortgage of the defendants E. A. Reed and H. H. Henderson of March 27th, 1890, have been paid, and the plaintiffs in this action are still the owners and holders of said notes and said mortgage; that the amount unpaid on said notes is the principal of each note, with interest from September 26th, 1890, at the rate of eight per cent. per annum.

XXVIII.

That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said — duly made and entered an order appointing the defendant George H. Burgitt, who is plaintiff in this cross-complaint, guardian of the person and estate of the said
41 defendant, Edward A. Reed, and he, the said defendant, George H. Burgitt, accepted the said appointment, and on the 22nd day of December duly qualified as such guardian, and on said last-mentioned day said probate court duly issued letters of guardianship to the defendant George H. Burgitt as such guardian, and the said George H. Burgitt is now such guardian of such estate.

As conclusions of law from the foregoing facts, the court hereby now finds and decides:

1. That the plaintiffs intended to convey to the defendants Edward A. Reed and Hiram H. Henderson the following tract of land, to wit: "An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, Weber county, Utah."

2. That the plaintiffs have not now nor never did have a good title in fee-simple to the above-described land, and that the several notes given by the defendants to the plaintiffs, including the note given to the bank and the sums of money paid by defendants to the plaintiff, were all without consideration.

3. That the representations made by plaintiffs to Edward A. Reed and Hiram H. Henderson concerning the title of said land were untrue and a fraud in law upon said defendants.

4. That the title of the Union Pacific Railway Company to the land in controversy is not a good title, but is encumbered, and what title it has may be defeated at any time by the United States before the issuance of patent.

42 5. That the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, are entitled to recover from the plaintiffs in this action the three certain promissory notes of Reed and Henderson—one for two thousand four hundred and forty-four and $\frac{44}{100}$ dollars, bearing date of March 26th, 1890, and becoming due on September 25th, 1890; also one note for two thousand four hundred and forty-four and $\frac{45}{100}$ dollars, bearing date of March 26th, 1890, an- becoming due on the 26th day of March, 1891, and also one note for three hundred and ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, and becoming due on demand—and that said plaintiffs deliver to said defendants, George H. Burgitt and Hiram H. Henderson, said notes; and that said defendants Henderson and Burgitt, as guardian aforesaid, recover from said plaintiffs, Louis B. Adams and Watson N. Shilling, the sum of $3,520.00 *dollars* and costs of suit, and that a decree be entered accordingly

That the deed of plaintiffs to defendants, dated March 27th, 1890, conveyed nothing of value.

That the quitclaim deed of November, 1891, from the U. P. Railway Company to Adams and Shilling did not release the rights of the company to enter upon the land and explore for minerals other than coal.

That the United States held and retained the right to explore and authorize the exploration of said lands for minerals other than coal, and if found the grant to the railroad company would not pass to the company any title to said land until patent issued.

JACOB S. BOREMAN,
Special Master in Chancery and Referee.

July 21st, 1894.

Found and approved this 21st day of July, 1894.

43 In the District Court in and for the Fourth Judicial District of the Territory of Utah, County of Weber.

Fourth District Court.

Filed July 21, 1894. K. S. Boreman, Clerk.

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiffs, *vs.* EDWARD A. REED, MILLIE G. REED, HIRAM H. Henderson, and George H. Burgitt, as Guardian of the Estate and Person of Edward A. Reed, a Person Incompetent to Manage His Own Affairs, Defendants.	Judgment and Decree.

This cause having been heretofore, to wit, on the twenty-third day of June, A. D. 1894, *been* referred by the court, on consent of the parties to this action, to Jacob S. Boreman, as special master in chancery, to try the issues and to make findings of fact and conclu-

sions of law, and said special master in chancery having tried said issues as raised by the complaint and answer and cross-complaint, and the stipulation filed by the parties herein, and said report and findings of fact and conclusions of law having been this 21st day of July, A. D. 1894, filed with this court, and this court, from said report, findings of fact, and conclusions of law, having found its findings of fact and conclusions of law and ordered judgment to be entered in accordance with said conclusions of law: now, therefore, it is ordered, adjudged, and decreed:

1. That the contract of sale made by the plaintiffs to the defendants Hiram H. Henderson and Edward A. Reed for the following-described property, to wit:

44 The northeast quarter, the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest — of section nine (9), on township five (5) north of range two (2) west of the Salt Lake meridian, U. S. survey, be, and the same is hereby, declared to be null and void.

2. It is further ordered, adjudged, and decreed that the notes hereinafter described and the mortgage given to secure the payment of the same be, and they are hereby, declared null and void; that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, do have and recover from the plaintiffs in this action the three promissory notes of Reed and Henderson—one for $2,444.44, bearing date of March 26th, 1890, and becoming due on September 25th, 1890; also one for $2,444.45, bearing date of March 26th, 1890, and becoming due on the 26th day of March, 1891, and also one note for $391.10, bearing date of June 26th, 1891, and becoming due on demand—and that the said plaintiffs deliver to said defendants, Hiram H. Henderson and George H. Burgitt, said notes.

3. It is further ordered, adjudged, and decreed that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, do have and recover of and from the plaintiffs the amount of money heretofore paid on the purchase price of said land, amounting to $3,520.00, and interest at the rate of eight per cent. per annum, and costs of suit, taxed at $—.

JAMES A. MINER, *Judge.*

Done in open court this 21st day of July, 1894.

45 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and W. N. SHILLING, Plaintiffs,
vs.
E. A. REED and H. H. HENDERSON *et al.*, Defendants. } Stipulation.

It is hereby stipulated between the parties in the above-entitled action that all the allegations in the cross-complaint are hereby deemed denied without filing an answer thereto; and it is further stipulated and agreed that the allegations in the defendants' answer

and cross-complaint are sufficient to put in issue any defect or defects in plaintiffs' title to part or all the real estate described in plaintiffs' amended complaint that may now or have heretofore existed against the same, and all proper evidence may be introduced by either the plaintiffs or defendants either in support or in derrogation of said title notwithstanding the defects to said title may have not been specifically pleaded in the answer and cross-complaint.

BROWN AND HENDERSON,
Attorneys for Defendants.
JAMES N. KIMBALL AND
E. M. ALLISON, JR.,
Attorneys for Plaintiffs.

Dated June 6th, 1894.

46 In the Fourth Judicial District Court, Territory of Utah, County of Weber.

Fourth District Court, Utah.

Filed after settlement, August 4, 1894. K. S. Boreman, clerk, by L. B. Best, deputy.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.

Statement of the case, to be used on motion for a new trial and on appeal, if an appeal is taken.

Appearances: Messrs. Kimball and Allison, attorneys for plaintiffs; Messrs. Brown and Henderson, Richards and Macmillan, H. H. Henderson, Esq., attorneys for defendants.

This cause having been heretofore, to wit, on the 23rd day of June, 1894, on motion of James N. Kimball, Esq., attorney for the plaintiffs, and by consent of H. H. Henderson, Esq., attorney for the defendants, referred to Jacob S. Boreman, Esq., as a special master in chancery, to try any and all issues, whether of law or fact, and conclusions of law, and a form of decree, and make due report
47 thereof to the court:

Now, on this the 2nd day of July, 1894, said cause came on for hearing before said special master in chancery; whereupon the following proceedings were had:

It was agreed between Mr. Henderson and Mr. Kimball that in this case that the case should proceed to trial before the referee, and that so soon as an administrator of the estate of Edward A. Reed was appointed he should be substituted as defendant in this action, and as of this date, in place of Edward A. Reed, who has died since the

commencement of this action, and that thereupon the action shall be dismissed as to George H. Burgitt, guardian of the estate and person of Edward A. Reed.

It is agreed by the parties to this action that the fees of the referee for the first day shall be $25.00 and for each additional day $15.00.

It is admitted that the land lies in section nine (9), township five (5) north of range two (2) west of the Salt Lake meridian, and is part of the land granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862.

Mr. KIMBALL: I will offer in evidence the mortgage dated April 16th, 1867, and recorded November 23rd, 1871, in Book "A" of Mortgages of Weber County, at page 176, from the Union Pacific Railroad Company to Cyrus H. McCormick and John Duff, as trustees on all of the lands granted by act of Congress approved July 1st, 1862, and the act amendatory thereto, approved July 2nd, 1864. The trustees are authorized to release the lien created hereby upon any particular parcel of land upon payment of the purchase price thereof, and in case a vacancy shall happen in the board of trustees the remaining trustee shall, while said vacancy exists, have
48 all the rights, exercise all the powers, and discharge all the duties devolving on said trustee.

Then I offer in evidence an instrument called "an appointment," dated October 20th, 1873, recorded February 12, 1874, in Book I of Deeds, page 186, from John Duff to Frederick L. Ames, appointing Frederick L. Ames trustee in place of Cyrus H. McCormick, resigned.

I now offer in evidence a mortgage dated December 18th, 1873, recorded February 12th, 1874, in Book "A" of Mortgages, page 48, from the Union Pacific Railroad Company to the Union Trust Company of New York.

I now offer in evidence a warranty deed dated December 11th, 1883, recorded February 4th, 1885, in Book "R" of Deeds, page 601, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to William Van Dyke of the northwest quarter of the northeast quarter of section nine, township five (5) north of range two (2) west of the Salt Lake meridian.

I now offer in evidence a certificate dated September 28th, 1885, and recorded January 13th, 1886, in Book "T," page 225, from the Union Pacific Railroad Company, by its president and secretary, to whom it may concern, confirming and validating all of the deeds which had been signed by the vice-president of the company.

I now offer in evidence a warranty deed dated April 28th, 1887, recorded September 27th, 1887, in Book V, page 228, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to John Selman, conveying the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian.

I now offer in evidence a warranty deed dated January 22nd, 1886, recorded January 22nd, 1886, in Book "S," page 614, from William Van Dyke to Louis B. Adams and Watson N. Shilling,

conveying the northwest quarter of the northeast quarter of section nine, township five north of range two west.

49 I now offer in evidence a warranty deed dated September 27th, 1887, recorded October 1st, 1887, in Book W, page 130, from John Selman to Louis B. Adams and Watson N. Shilling, conveying the northeast quarter of section nine, township five north of range two west.

I now offer in evidence a warranty deed dated October 18th, 1889, recorded July 5th, 1890, in Book 1, page 413, from the Union Pacific Railroad Company and the Union Trust Company to Adams and Shilling, conveying the south half of the northeast quarter, the east half of the southwest quarter, and the southeast quarter of section nine, township five north of range two west.

I now offer a warranty deed dated January 4th, 1888, and recorded May 1st, 1891, from the Union Pacific Railroad Company and Fred/erick L. Ames, trustee, to Louis B. Adams and Watson N. Shilling, conveying the southwest quarter of the southwest quarter of section nine, township five north of range two west.

I now offer in evidence an instrument, "appointment of trustee," dated July 2nd, 1889, recorded October 19th, 1889, in Book N, page 441, Frederick L. Ames to the Union *Pacific* Trust Company of New York.

Also an instrument entitled "conveyance," dated July 13th, 1889, recorded October 19th, 1889, from Frederick L. Ames to the Union Trust Company of New York.

Also an instrument dated July 15th, 1889, and recorded October 19, 1889, called "resignation," from Frederick L. Ames to who- it may concern.

Also an instrument called "conveyance and quitclaim," dated January 15th, 1890, and recorded June 19th, 1890, from Frederick L. Ames to the Union Trust Company of New York.

I offer in evidence a quitclaim deed, No. 128, from the Union Pacific Railroad Company to Louis B. Adams and Watson N. Shilling, dated November 2nd, 1891, remising and releasing

50 and forever quitclaiming to said Adams and Shilling all the title of the railroad company, all its interests and claim to any coal which may be hereafter found beneath the surface of the south half of the northeast quarter and the east half of the southwest quarter and the southwest quarter of section nine, in township five north of range two west of the Salt Lake meridian.

It is agreed that any and all of these conveyances may be copied and made a part of the record of this case by any party to this action, and it is also further agreed that the foregoing conveyances are introduced in evidence subject to all legal objections and exceptions that the parties defendant may take thereto in the argument of this case.

It is admitted by the parties defendant that on the 27th day of March, 1890, Louis B. Adams and his wife and Watson N. Shilling and his wife made a warranty deed to Edward A. Reed and Hiram H. Henderson for two-thirds of four hundred and forty acres of land, describing the same as lying in section nine, township six north

of range two west of the Salt Lake meridian, and that on the same day the defendants Reed and Henderson made and delivered to the plaintiffs a mortgage on the land last described.

JAMES N. KIMBALL, Esq., being duly sworn on behalf of the plaintiffs, testified as follows:

I state that on the 27th day of March, 1890, I prepared a deed from Louis B. Adams and his wife and Watson N. Shilling and his wife, above mentioned, as made to the defendants Reed and Henderson, for an undivided two-thirds of four hundred and forty acres of land, and that that deed is in my handwriting. At the time I drew the deed I had before me the deeds from Van Dyke and Selaman to Adams and Shilling, and also the deed from the Union Pacific Railroad Company to Adams and Shilling, except the
51 quitclaim deed made in November, 1890, by the railroad company to Adams and Shilling, and that in writing the description in the deed from Adams and Shilling and their wives to Reed and Henderson, I mistakenly wrote township six north of range two west instead of township five.

I further testify that on the 29th of September, 1891, I prepared the quitclaim deed, a copy of which is found at pages four and five of the amended complaint, from Louis B. Adams and Watson N. Shilling and their wives to Edward A. Reed and Hiram H. Henderson which conveys an undivided two-thirds of 440 acres of land situated in section nine, township five north of range two west.

REFEREE: How long was that after the original deed was made?

Mr. KIMBALL: That was pretty nearly a year.

Mr. HENDERSON: Pretty nearly a year and a half; the original deed was in March, 1890, and this was in September, 1891.

It is admitted by the parties to this action that the mortgage set out in the complaint as made by the defendants Reed and Henderson to the plaintiffs was, so far as the description is concerned, copied from the warranty deed set out in the amended complaint at pages two and three thereof.

Mr. KIMBALL: I offer in evidence the notes described in the mortgage from Reed and Henderson to Adams and Shilling of the date of March 27th, 1890.

Mr. HENDERSON: I will admit that the face of the notes, except the interest, as alleged in the cross-complaint, was not paid.

An adjournment was here taken until 1.30 p. m.

1.30 P. M., JULY 2ND, 1894.

Mr. KIMBALL: If the court please, I will offer in evidence a lease dated the 28th day of March, 1890, between Edward A. Reed and Hiram H. Henderson to Louis B. Adams and Watson N.
52 Shilling, leasing Adams and Shilling the east half of the south half of the southwest quarter and the northeast quarter of the southwest quarter of section nine, township five north of

range two west of the Salt Lake meridian, signed by Hiram H. Henderson and E. A. Reed, witnessed by George H. Burgitt.

Judge MACMILLAN: That will go in under the same objection.

Mr. L. B. ADAMS, being first duly sworn and examined in chief by Mr. Kimball, on behalf of the plaintiffs, testified as follows:

Q. Mr. Adams, you are one of the plaintiffs in this action?
A. I am.
Q. Do you remember the plaintiffs selling to Reed and Henderson some land about the 27th of March, 1890?
A. I do.
Q. Which one of the plaintiffs negotiated for that sale?
A. Mr. Reed.
Q. The plaintiffs, I mean?
A. I did.
Q. And with which one of the defendants?
A. With Mr. Reed.
Q. Whereabouts is the land you were selling or negotiating to sell located with reference to Ogden City?
A. It is about five miles and a half southwest of Ogden City, in the Kanesville school district.
Q. At that time state whether or not you showed the land to either of the defendants; and, if so, to which one?

Judge MACMILLAN: Mr. Reed is dead. We want an objection to any testimony as between Mr. Reed and him.

Mr. KIMBALL: I am not asking for any statements between him and Mr. Reed, but for what land, if any, he showed to the defendants or either of them.

A. I did not show the land to either of them, to my recollection.
53 Q. Did you have any talk with Mr. Henderson about where the land was located?
A. If I did I have no recollection of it.
Q. What other land, if any, did Adams and Shilling own in a body of 440 acres than this land you now mention?
A. None; excuse me—how is that?

(Question repeated.)

A. No other than that in a body.
Q. What township and range was that in?
A. I would have to refer to the deed, Mr. Kimball.
Q. Well, the deed is in township five, section nine—township five north of range two west.
A. Well, that is it, then.
Q. Do you reme-ber the fact that there was a mistake in the deed from yourself and Shilling to Reed and Henderson?
A. Yes; I learned that afterwards.
Q. How long afterwards—about how long, Mr. Adams?

A. I do not remember; it must have been all of a year. I think it was more than a year before I learned it.

Q. Do you remember the maturity of the second note they gave?

A. Yes; I remember when it matured.

Q. What time was it you first learned the mistake with reference to the maturity of that note?

A. I do not think I heard of it. I think it was subsequent to the maturity. It was so long ago I have paid no attention to the matter, and I am now testifying to my best recollection at this time.

Q. What land did you intend to sell or convey to Reed and Henderson at the time you made the deed in March, 1890?

A. A tract of land owned by Adams and Shilling, under fence in Kanesville school district, amounting to 440 acres, more or less.

Q. Two-thirds of that tract?

A. Two-thirds of that tract.

Q. That is the same tract of land they leased to you subsequently?

A. It is.

54 Cross-examination by Judge MACMILLAN:

Q. This land, you say you owned it—you bought from the Union Pacific?

A. We bought the bulk of it from the Union Pacific; I think all but eighty acres.

Q. Who did you buy that from?

A. We bought forty acres from a man by the name of Neilson and forty acres from a man by the name of Selman.

Q. It is all in the same section?

A. The same section; these two forties that we bought outside of the Union Pacific were joining.

Q. Included land granted to the Union Pacific by the United States Government?

A. I presume so; I think I also bought one forty from George N. Ritter, but I am not sure whether I have his deed; I think it was a contract that he turned over, a U. P. contract.

Q. This lease was made the same — that the deed was made?

Mr. KIMBALL: The next day after.

Judge MACMILLAN: You never showed the land to either one of these parties?

A. No, sir; Mr. Reed went down several times.

Q. You do not know that from your own knowledge?

A. No; only what he told me.

Judge MACMILLAN: We ask that what he told Mr. Adams be stricken out.

Q. It is the land, is it, where your nursery is now?

A. No, sir.

Mr. KIMBALL: I submit, if your honor please, that we are entitled to what Mr. Reed told him.

Judge MACMILLAN: I withdraw the objection made to the admission of testimony as to what Mr. Reed said.

Plaintiffs rest.

55 *Defendants' Case.*

H. H. HENDERSON, being duly sworn, and examined by Judge Macmillan, testifies as follows:

Q. Mr. Henderson, will you relate this transaction as you remember it?

A. It is my recollection of purchasing this property along about a day or two before this deed was given, which bears date, I believe, of March 27th, 1890. I went into the bank and saw Mr. Adams, and I asked him if he had some land lying west of the town here, a tract of land four or five hundred acres. He said he did. I asked him how much he asked for it. Well, he says at that time that he could not give any definite answer how much he did ask for it, for the reason that Mr. Shilling was interested with him. It is my recollection that that was in the forenoon, and he made an engagement with Mr. Shilling for that evening about seven or half past seven, and I met Mr. Adams and Mr. Reed and Mr. Shilling over in the Utah National bank. I stood right out there in front of Mr. Adams' desk. We did not go in behind the bars. We talked the property over, and Mr. Adams did the talking and said they asked twenty-five dollars an acre for it. We asked them if they had an abstract. Mr. Adams said they did not have any at present. I asked him if he had a good title to the property, and he said that they had, and we talked along there for a few minutes, and they said they would get an abstract for us all right, and we concluded that we would purchase it. First we wanted the whole property. They concluded they would not sell but two-thirds interest; they wanted to retain an interest in the land, and the fact was that the bargain was concluded that evening. It was
55½ along about seven or seven thirty. It was just after dark, and the next morning the deed was made out and the mortgage was made out, and we signed it and gave the notes. I never saw the property and never saw it to this date. I relied on what Mr. Adams said. I understood it was land lying down there three or four miles west or southwest, as Mr. Adams says. It lay over in this direction (pointing), and I never ascertained anything about the title until a year after that, when the abstract was made, in September, 1891, and at that time in looking over the abstract I found this mistake—that he did not own the property in township six, as the deed and the mortgage called for, but he did own property in township five; but the abstract was made out for township five. When we looked over the abstract I did not think the title was perfect or he had a good title, and I told Mr. Adams at that time that he did not have a good title.

Q. Which time?

A. Well, it was just after this abstract was made. It was along in the latter part of September, 1891. I told him then that I did not think he could give a good title to it, even at that time, and I told him that we would rescind the sale, and a day or so after that

Mr. Kimball came over with this quitclaim deed that he has here, tendering me the quitclaim deed with $1.50, as he states.

Mr. KIMBALL: It is not a quitclaim purely; it is a special warranty.

WITNESS: Well, that is what it is called on the outside. I refused to accept it, and served a notice on Mr. Adams and Shilling rescinding the sale and demanding back the purchase price, with interest. We had paid at that time $2,444.44, I believe, one-third of the purchase price, and afterwards we paid the interest to September 26th, I believe, of 1890, and we had also given a note for interest from September 26th, 1890, or whatever date that note bears.

56 Mr. KIMBALL: That is the one we produced and offered to cancel or surrender.

Judge MACMILLAN: Now, Mr. Henderson, would you have bought that land if you knew that the title was as it was at that time?

Mr. KIMBALL: I submit that is hardly proper.

(Objection overruled and exception taken by plaintiffs. J. S. B.)

WITNESS: I would not have bought the land they offered me under the quitclaim deed if I had known that it was in the condition that it was, even in township six.

Q. When did you first discover this mistake?

A. Did not discover it until September, 1891.

Q. What led you to discover it?

A. We had some men here from Denver at that time who were thinking of purchasing property—in fact, they made us an offer on the property if the title was all right. This abstract was gotten out by us for them.

Q. Did Mr. Adams or Mr. Shilling ever give you any abstract?

A. No; they never did.

Q. When you got this abstract out to sell the land to these people from Denver you found that there was objections to the title?

A. Yes; they would not take it.

Q. Does the record show these faults in the title?

A. Yes, sir.

Q. Now, since that *that*, has it been further incumbered; and, if so, by what?

A. Well, all I know about it is what the abstract shows. I will read the incumbrances that have been put upon it since that time

(Reads from abstract.)

At the time Adams and Shilling gave us this deed and at the time they also tendered us the quitclaim deed in September, 1891, Byron H. Douglass and Celestia Douglass had a judgment against Louis B. Adams and Watson N. Shilling, which is recorded

57 in Judgment Record "A," page 445, in the district clerk's office of this district, and since that time Louis B. Adams and William F. Adams, Louisa M. Adams, Edward M. Allison, Jr., and Sarah V. Walker had given a quitclaim of all their right, title, and interest to George B. Barstow of all their property.

Mr. KIMBALL: Since what time?

WITNESS: Since you offered me the deed of September 29th, 1891. That quitclaim deed bears date of August 31st, 1893, and was filed September, 1893, in Book 19, page 447, of county records of Weber county.

Mr. KIMBALL: I submit that this is immaterial and incompetent; it only purports to be all their right, title, and interest and they had none long subsequent to the tender to them of the special warranty deed.

(Objection is sustained. J. S. B.)

REFEREE: I do not think that would effect the title any.

Judge MACMILLAN: We would like to get it in, because in the argument we will contend, in the first place, what they did deed to us was a misdescription, and that the deed they afterwards gave us was simply a quitclaim deed, with a special warranty in it, to another piece of ground—the piece they intended to give us—so we would like to get it in subject to your ruling, on the argument of the case, as to whether it ought to go in.

(Objection sustained. J. S. B.)

REFEREE: It can go in with that understanding.

Mr. HENDERSON: Then the next is a county tax deed from J. P. Ledwidge, county clerk, to Louis B. Adams and Watson N. Shilling, dated Jan'y 18t-, 1894, and filed Jan'y 18th, 1894, in Tax Book 1, page 121.

Mr. KIMBALL: I will make the same objectio- to that, that it is immaterial and incompetent, long subsequent to the transaction and long subsequent to the tender of this special warranty deed.

58 Judge MACMILLAN: We want it to go in the same way until the argument.

(Objection sustained. J. S. B.)

REFEREE: It may go in that way.

Mr. KIMBALL: I except to this ruling.

Mr. HENDERSON: The next is G. R. Belnap, sheriff of Weber county, by Oliver Belnap, deputy sheriff, to whom it may concern; attachment filed March 28th, 1894; recites that he attached an undivided one-sixth interest in the lands described.

Mr. KIMBALL: I object to that because that attachment only purports to be on Shilling's interest, one-sixth.

Mr. HENDERSON: Well, we will skip that and take the next one, filed March 26th, 1894. This is by Nat. M. Brigham, United States marshal, by E. W. Exum, deputy United States marshal, to whom it may concern; attachment filed March 26th, 1894; attaches the southwest quarter of the southeast quarter and the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian, and other lands.

Mr. KIMBALL: I object to that as immaterial and incompetent.

REFEREE: I do not think it is proper.

(Objection sustained. J. S. B.)

It is agreed that all instruments offered in evidence by either party may be admitted in evidence subject to all legal objections and exceptions on the part of the defendants so far as plaintiffs' instruments are concerned, and subject to specific objections made by plaintiffs to defendants' instruments in writing, the court to make its ruling after the argument and note the exceptions of each party at that time against whom his ruling is made.

59 Judge MACMILLAN (to witness): Mr. Henderson, have you seen this land?

A. I have not.

It is here understood and agreed between the parties that the part in writing, signed L. B. Adams, on the lease (heretofore offered in evidence) and surrounded by a pencil line is not included in plaintiffs' offer of the lease in evidence.

Q. When you informed these people that you rescinded this contract did you give them any reason for it?

A. I told them——

Q. That was in writing?

Mr. KIMBALL: The writing would be the best evidence.

Judge MACMILLAN: I had forgotten that. Where is the writing?

A. I served copies on Mr. Adams and Mr. Shilling. The original, I believe, I made duplicates. Before I served this notice in writing I had told him verbally that we rescinded the sale.

That was before Mr. Kimball tendered me the quitclaim deed; then, after the quitclaim deed was tendered, I served notice upon them demanding back this money and the cancellation of the note, with the interest on the money we had already paid.

Mr. KIMBALL: I object to that as immaterial and incompetent and as not the best evidence, as he says that notice was in writing.

(Objection sustained. J. S. B.)

Judge MACMILLAN: Do you know where that notice is, Mr. Hend-rson?

A. I have got it here in the papers somewhere.

(Witness produces paper and hands same to examining counsel.)

Q. This is a copy of the notice you served on the plaintiffs?

A. Yes, sir.

We offer it in evidence.

60 Mr. KIMBALL: I make the same objection, that it is immaterial and incompetent, being subsequent to the date of the tender of the special warranty or quitclaim deed.

(Objection is over-uled and exception taken by plaintiffs. J. S. B.)

REFEREE: It may go in subject*ion* to the objection.

Judge MACMILLAN: Mr. Henderson, did you notify them before that?

Mr. KIMBALL: That is already testified to, that he gave them oral notice.

WITNESS: I gave them oral notice, as I said, and demanded back the money.

Q. I see this abstract, the first part of it, is dated the 3rd day of September; can you place the date of that oral notice in relation to the date of this?

A. It was the day or next day after I received the abstract. It was after I had a chance to look it over and pass on it. I wish to have it go on the record that the abstract is of the date of September 3rd, 1891.

K. S. BOREMAN, being first duly sworn and examined on behalf of the defendants, testified as follows:

Q. Mr. Boreman, what position do you hold?

A. Clerk.

Mr. KIMBALL: I will admit that he is clerk of the fourth district court and custodian of the records of that court.

Q. Mr Boreman, have you examined the judgment docket of your court?

A. Yes, sir.

Q. On these judgment dockets have you found any judgments against W. N. Shilling or L. B. Adams?

A. I find some against Shilling and Adams; yes, sir.

Q. Will you turn to your record and state the date and the amount?

A. In Judgment Docket "A," on page 66, appears a judgment on verdict for the possession of certain lands, docketed June 4th, 1887.

61 Q. Who is judgment creditor?

A. Central Pacific Railroad Company is judgment creditor. Docket B, page 66; Judgment Record A, page 288, dated June 24th, 1887.

Q. Does that carry a money judgment?

A. I have not looked at it.

Mr. KIMBALL: There is none docketed?

A. None docketed.

Mr. KIMBALL: I object to this offer as immaterial and incompetent.

Mr. HENDERSON: That is all right; we do not insist upon it; it does not show a money judgment.

(Objection sustained.)

Q. What is the next one?

A. On page 124, Docket A: Judgment against L. B. Adams and W. N. Shilling in favor of Byron H. Douglass to quiet title and for $64.30 costs, dated April 18th, 1889. Judgment Record A, page 445. It appears satisfied April 18th. A. R. Heywood, attorney for Byron and Celestia Douglass.

Q. When was it satisfied, according to the date?
A. September 7th, 1891.
Q. When was this record satisfied?
A. I have no recollection; do not know anything about it except it shows on the face of the record September 27th, 1889.
Q. What next do you find?
A. In Judgment Docket B, page 222: Judgment in favor of Fred. J. Kisel against W. N. Shilling for $8,000, interest at 10 %, costs taxed at $64.45; docketed May 11th, 1894. Judgment Record E, page 639, the following entries appear on the margin——

Mr. KIMBALL: I object to this judgment as immaterial and incompetent. They were only taken a few weeks ago and they are against W. N. Shilling.

(Objection sustained. J. S. B.)

REFEREE: They can go in subject to the objections.
WITNESS: The following entries appear on the margin: May 11th, 1894, there is paid on this judgment $7,994.80. A. R. Heywood, attorney for plaintiff.
62 Q. What is the next one?
A. Further on that execution on return showing this judgment to be fully satisfied—K. S. Boreman, clerk; June 24th, 1894. Another entry is: Judgment against W. N. Shilling in favor of D. H. Perry, Jr., by default for $1,024.68, interest at 10 %, and costs taxed at $53.75.

Mr. KIMBALL: I make the same objection to that judgment, as being immaterial and incompetent.

(Objection is sustained. J. S. B.)

WITNESS: Judgment is docketed May 11th, 1894, Judgment Book E, page 639.

Q. What page is it in the Judgment Docket?
A. On page 222 of Docket B the following entry appears on the margin: May 11th, 1894, there is paid on this judgment $2,880. A. R. Heywood, attorney for plaintiff.
Q. What is the next judgment?
A. The next judgment appears on Judgment Docket B, page 234, against W. N. Shilling for $6,854.12, with interest at 10 % and costs taxed at $61.40. Docketed June 11th, 1894, Judgment Record E, page —. I have not got the page down.

Mr. KIMBALL: I object to that as immaterial and incompetent for the reason that it is long subsequent to the execution of the mortgage sought to be foreclosed, and, second, because it is a lien only on the interest of W. N. Shilling, being only an undivided one-sixth, as shown by the attachment papers themselves.

Q. Has this judgment ever been satisfied?
A. Not so far as it appears on the record.

Mr. KIMBALL: As a matter of fact, it does not.

(Objection sustained. J. S. B.)

Judge MACMILLAN (to H. H. Henderson): What was the reason that you refused the deed?

A. The first reason was that they did not have a good title to
63 the property, and the second was that it was not a full warranty deed.

Q. That is the second deed?

A. No, sir; that one which bears date of September 29th, 1891.

Q. Did you inform them?

A. I told Mr. Kimball so.

It is admitted that the lands in controversy are and have been heretofore used and cultivated as agricultural lands, and lay in a valley at the base of the Wasatch mountains, and that no exploration or examination has ever been made on said land for coal and minerals of any kind or description, and that there is not patent of record in Weber county, being the county in which the lands in controversy are situated, for the east half of the southwest quarter of section nine, township five north of range two west of the Salt Lake meridian, and being the land in controversy, and the conveyances and instruments introduced in evidence in this action by the plaintiffs are the chain of title upon which plaintiffs base their title to the lands in controversy and are the only chain of title of record in the county of Weber.

Mr. KIMBALL: I now offer in evidence, in behalf of the plaintiffs, a patent by the United States of America to the Union Pacific Railroad Company, dated February 24th, 1887, and recorded in the office of the county recorder, in Book 1, page 181, for the northwest quarter of section nine, township five north of range two west of the Salt Lake meridian. I offer it as tending to show t-at the United States had passed upon the character of the land in controversy, that being a part of the same section.

Judge MACMILLAN: We offer all of the objections that we did before—that it is immaterial, irrelevant, and incompetent, and it being other lands that that in controversy.

REFEREE: It goes in subject to the same objection.

Defendants rest.

64 Mr. KIMBALL: I offer in evidence notice of the pendency of this action, filed January 8th, 1892, in the recorder's office of Weber ——, Utah, setting forth the object of the action and describing the lands affected by it.

The above are all the proceedings and all the evidence had in said cause.

The defendants waived all objections to the introduction of the documentary evidence.

65 In the District Court, Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson, George H. Burgitt, Guardian of the Estate and Person of Edward A. Reed, a Person Incapable of Conducting His Own Affairs.

It is hereby stipulated and agreed by and between the parties to this action that the plaintiffs can use on their motion for a new trial in this action, the same as though incorporated into the statement of the case, the following documentary evidence, introduced by them in evidence on trial in this action before the referee, to wit:

1. A mortgage dated April 16th, 1867, and recorded Nov. 23rd, 1871, in Book "A" of Mortgages of Weber County, Utah, page 176, from the Union Pacific Railway Company to Cyrus H. McCormick and John Duff, as trustees.

2. An instrument called an appointment, dated October 20th, 1873, and recorded February 12th, 1874, in the office of the county recorder of Weber county, Utah, in Book "I" of Deeds, page 176, from John Duff to Frederick L. Ames.

3. A mortgage dated December 18th, 1873, and recorded in the office of the county recorder of Weber county, Utah, February 12th, 1874, in Book "A" of Mortgages, at page 48, from the Union Pacific R. R. Company to the Union Trust Company of New York.

66 4. A warranty deed dated December 11th, 1883, and recorded February 4th, 1885, in the said county recorder's office, in Book "R" of Deeds, at page 601, from the Union Pacific R. R. Company and Frederick L. Ames to William Van Dyke.

5. An instrument called a certificate, dated September 28th, 1885, and recorded in the office of said county recorder January 30th, 1886, Book T, page 225, from the Union Pacific R. R. Company to whom it may concern.

6. A warranty deed dated April 28th, 1887, and recorded Sept. 27th, 1887, in the office of said county recorder, in Book "V" of Deeds, page 228, from the Union Pacific R. R. Company and Frederick L. Ames to John Selman.

7. A warranty deed dated January 22nd, 1886, and recorded in the office of said county recorder January 22nd, 1886, in Book "S" of Deeds, page 614, from William Van Dyke to Louis B. Adams and Watson N. Shilling.

8. A warranty deed dated September 27th, 1887, and recorded in the office of said county recorder October 1st, 1887, in Book "W" of Deeds, page 130, from John Selman to Louis B. Adams and Watson N. Shilling.

9. A warranty deed dated October 18th, 1889, and recorded in the office of said county recorder July 5th, 1890, in Book One of Deeds, at page 413, from the Union Pacific R. R. Company and the Union Trust Company of New York to Adams and Shilling.

10. A warranty deed dated January 4th, 1888, and recorded in the office of said county recorder May 1st, 1891, from the Union Pacific R. R. Company and Frederick L. Ames, trustee, to Louis B. Adams and Watson N. Shilling.

67 11th. An instrument called an appointment of trustee, dated July 2nd, 1889, and recorded in the office of said county recorder Oct. 19th, 1889, in Book *of* "N" of Mortgages, page 441, from Frederick L. Ames to the Union Trust Company of New York.

12. An instrument called a conveyance, dated July 13th, 1889, and recorded in the office of said county recorder October 19th, 1889, from Frederick L. Ames to the Union Trust Company of New York.

13. An instrument called a resignation, dated July 15, 1889, and recorded October 19th, 1889, from Frederick L. Ames to whom it may concern.

14. An instrument called a conveyance and quitclaim, dated Jan. 15th, 1890, and recorded June 19th, 1890, from Frederick L. Ames to Union Trust Company of New York.

15. A quitclaim deed, No. 128, dated November 2nd, 1891, from the Union Pacific R. R. Company to Louis B. Adams and Watson N. Shilling.

And it is further stipulated and agreed that in the event either of the parties to this action appeal this case to the supreme court of the Territory, that the instruments designated above shall be copied at large and attached to the statement of the case in this action, and shall thereupon become a part thereof the same as though the same were copied into the same at this time.

Ogden, Utah, August 2nd, 1894.

JAMES N. KIMBALL,
Attorney for Plaintiffs.
RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants.

68 *Specification of Particulars in which the Evidence is Insufficient to Sustain the Findings and Decision of the Court and of the Master in Chancery.*

1. The evidence is insufficient to justify that part of the third finding of fact in the words and figures following, to wit:

"That the representations made by Adams and Shilling, as aforesaid, to said Reed and Henderson were untrue," in this: that the evidence did not and does not show that Adams and Shilling did not have a good and indefeasible estate in fee-simple to the land described in finding of fact number two.

2. The evidence is insufficient to justify the second finding of fact, in this: that the evidence did not and does not show that the defendants Reed and Henderson, or either of them, rescinded the contract of sale between themselves and plaintiffs.

Specifications of Particulars in which the Conclusions of Law and Decision of the Court and Master in Chancery are against Law.

1. Conclusion of law number two is against law and contrary to the findings of fact, in this: that the evidence does not show that the plaintiffs did not or do not now have a good title in fee-simple to the lands described in conclusion of law number one, or that the notes mentioned in said conclusion of law number two are without consideration.

II. The third conclusion of law is against law, in this: that the findings of fact do not show that the representations by plaintiffs to Reed and Henderson concerning the title to the land intended to be conveyed by them were untrue.

III. The fourth conclusion of law is against law, in this: that the findings of fact do not show that the title of the Union Pacific Railway Company to the lands described in finding of fact number two was not good, or that it was incumbered, or that it may be defeated at any time by the United States.

69

IV. The fifth conclusion of law is against law, in this: that the findings of fact do not show that Hiram H. Henderson and George H. Burgitt, guardian of E. A. Reed, or either of them, are entitled to recover of plaintiffs the promissory notes or money mentioned in said conclusion of law.

V. That the last two conclusions of law are against law, in this: that the findings of fact do not show and the evidence does not show that the quitclaim deed of November, 1891, did not release the right of the Union Pacific Railway Company to enter upon the land *and* intended to be conveyed to explore for minerals other than coal, and the findings of fact or the evidence did not show that the United States retained the right to explore or authorize the exploration of the lands intended to be conveyed for minerals other than coal.

Specifications of Errors of Law Occurring at the Trial and Excepted to by the Plaintiffs.

I. The master in chancery erred in his second conclusion of law, in this: that neither the findings of fact nor the evidence shows that the plaintiffs did not, do not now, and never did have a good title in fee-simple to the lands described in conclusion of law number one, or that the several notes given by the defendants to the plaintiffs mentioned in conclusion of law number two or that either of them were given without consideration.

II. The master in chancery erred in making the third conclusion of law, in this: that neither the findings of fact nor the evidence show that the representations made by the plaintiffs concerning the title to lands described in conclusion of law number one were untrue or a fraud in law upon the defendants or either of them.

70

III. The master in chancery erred in his fourth conclusion of law, in this: that neither the findings of fact nor the evidence showed or show that the title of the Union Pacific Rail-

way Company to the land in controversy (being the land described in conclusion of law number one) is not or was not a good title, or that it was incumbered, or that it could or might be defeated at any time by the United States before the issuance of patent.

IV. The master in chancery erred in his fifth conclusion of law, in this: that neither the findings of fact nor the evidence shows that the defendants Hiram H. Henderson, George H. Burgitt, as guardian of the estate of Edward A. Reed, or either of them are entitled to recover from the plaintiffs in this action the promissory notes or money mentioned in conclusion of law number five.

V. The master in chancery erred in the last two conclusions of law, in this: that the quitclaim deed mentioned in the next to the last conclusion of law does not show that the Union Pacific Railway Company did not release its right to enter upon the land in said conclusion of law described and explore the same for minerals other than coal.

That neither the findings of fact nor the evidence shows that the United States held or retained the right to explore or authorize the exploration of said land for minerals other than coal.

JAMES N. KIMBALL,
Attorneys for Plaintiffs and Appellants.

To said defendants and to Messers. Richards and Macmillan and H. H. Henderson, attorneys for defendants:

You will please take notice that the plaintiffs in the above-entitled action have prepared and do hereby serve on you the foregoing as their statement of the case in said action, to be used on their motion for a new trial on appeal, in event an appeal is taken by
71 either party in said action.

August, 1894.

JAMES N. KIMBALL,
Attorney for Plaintiffs.

I, the master in chancery who tried the above-entitled action, do hereby certify that the foregoing statement is correct, and the same is hereby allowed.

Dated August 4th, 1894.

JACOB S. BOREMAN,
Master in Chancery.

Served on us this 4th day of August, 1894.

RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants.

We, the attorneys in the above-entitled cause, hereby agree that the foregoing is correct.

Ogden, August 4th, 1894.

JAMES N. KIMBALL,
Att'y for Plaintiffs.

RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants.

72 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

LOUIS B. ADAMS *et al.*, Plaintiffs,
vs.
EDWARD A. REED *et al.*, Defendants. } Notice of Appeal.

To Messrs. Richards and Macmillan and H. H. Henderson, Esq., attorneys for defendants.

GENTLEMEN: You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of Utah Territory from the judgment made and entered in said district court on the 21st day of July, 1894, in favor of the defendants in said action and against the plaintiffs, and from the whole thereof.

You will also take notice that the plaintiffs hereby appeal to the supreme court from the order of said district court made and entered on the 10th day of August, 1894, overruling and denying the motion of plaintiffs for a new trial in said action, and from the whole thereof.

JAMES N. KIMBALL,
Attorney for Plaintiffs.

Ogden, Utah, August 28th, 1894.

Due service of this notice is hereby acknowledged.
August 24th, 1894.

H. H. HENDERSON AND
RICHARDS AND MACMILLAN,
Attorneys for Defendants.

73 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS *et al.*, Plaintiffs,
vs.
E. A. REED *et al.*, Defendants. } Order Overruling Motion for a New Trial.

This cause having been on the 8th inst., submitted to the court on plaintiffs' motion for a new trial, now comes the court and, being fully advised in the premises, orders that the said motion be, and the same is hereby, overruled and denied.

H. W. SMITH, *Judge.*

Done in open court this 9th day of August, A. D. 1894.

TERRITORY OF UTAH,
County of Weber, } *ss:*

We, the attorneys for the respective parties in the above-entitled action, do hereby certify that the foregoing transcript is correct, and that the copies of the judgment-roll, order overruling motion for a new trial, statement of the case, judgment and decree, and

notice of appeal, contained in said transcript, are full, true,
74 and correct copies as they appear on the files of the fourth district court of said instruments; and we further certify that an undertaking on appeal in due form has been properly filed by the plaintiffs and appellants.

Witness our hands this 18th day of September, 1894.

JAMES N. KIMBALL,
Attorney for Plaintiffs and Appellants.
RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants and Respondents.

75 In the Supreme Court of Utah Territory, Regular January Term.

MONDAY, *January 28th*, 1895.

LOUIS B. ADAMS *et al.*, Appellants,
vs.
EDWARD A. REED *et al.*

This cause, coming on regularly for hearing, was argued by Mr. John A. Marshall and Mr. James N. Kimball for the appellants, and by Mr. J. H. Macmillan and Mr. H. H. Henderson in reply, was submitted and taken under advisement.

76 In the Supreme Court of Utah Territory, Regular June Term.

MONDAY, *June 3rd*, 1895.

LOUIS B. ADAMS *et al.*, Appellants,
vs.
EDWARD A. REED *et al.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

Thereupon counsel for the appellants prays the allowance of an appeal to the Supreme Court of the United States and ask- that the amount of a bond to be given thereon be now fixed; and it was ordered that such appeal as prayed for be, and the same is hereby, allowed, and the amount of the bond to be given thereon is now fixed in the sum of three hundred dollars.

77 *In the Supreme Court of Utah Territory.*

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiff- and Appellants,
vs.
EDWARD A. REED, H. H. HENDERSON, *et al.*, Defendants and Respondents.

KING, *J.:*

The plaintiffs allege in their complaint that in March, 1890, they were the owners and entitled to the possession of certain land in Weber county; that on the 27th of said month they sold said estate to defendants and executed a warranty deed, but by mistake said property was described as being in township six instead of five; that on the 29th of September, 1891, as soon as said mistake was discovered, they made a quitclaim deed to defendants, correctly describing the land intended to be conveyed, which they tendered to defendants and now bring into court; that in part payment for said land defendants executed two promissory notes, which were secured by a mortgage on the land, but which mortgage contained the same error in description as said deed. Plaintiffs pray for the reformation of the mortgage and for its foreclosure.

Defendants answered and filed a cross-complaint, in which they averred that, relying upon the representations of plaintiffs that they owned and had a good title in fee-simple to 440 acres of land lying near Ogden City, and without investigating the title or seeing the land, they purchased an undivided two-thirds interest and
78 executed the mortgage described in plaintiffs' complaint in part payment of the purchase price; that subsequently they ascertained that plaintiffs were not the owners of and did not have an indefeasible and fee-simple title to said land or any title to the land conveyed; that thereupon they demanded back the amount paid to plaintiffs and the surrender and cancellation of the notes given in part payment; that said representations as to title were false and fraudulent, which plaintiffs then and there knew, and were made to defraud defendants. There are further allegations in the cross-complaint with respect to the character of plaintiffs' title and the fraudulent representations. Defendants pray that the mortgage and notes be cancelled and delivered up.

The principal questions for our determination are:

1. Did the Union Pacific Railroad Company have a fee-simple title to the land in township five which plaintiffs attempted to convey to defendants?

2. If so, was this title conveyed to defendants?

3. If the above questions are determined negatively, then was there such fraud upon the part of plaintiffs as to be the foundation for the re-cission of the contract between plaintiffs and defendants?

4. Do the facts of the case show a re-cission?

1. By the act of Congress passed July 1, 1862, certain lands were granted to the Union Pacific Railroad Company for the purpose of aiding in the construction of a transcontinental railroad. The lan-

guage of the grant is: "There be, and is hereby, granted to the said company * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of the railroad on the line thereof and within the limits of ten miles on each side of said road, not sold,
79 reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim would have attached at the time the line of said road is definitely fixed: Provided that all mineral lands shall be excepted from the operations of this act."

It is admitted that the land in controversy in this suit is within this grant, and that no patent has ever been issued therefor. The court below, adopting the findings of the referee, found that the land has been and is still used for agricultural purposes; also that no exploration or examination has been made for coal or minerals of any kind.

Appellants' contention is that the act of Congress above referred to was a grant *in præsenti* and passed the present legal title, at least as soon as the road was constructed and the identification of the sections became possible, to all of the lands embraced within it, except those to which a pre-emption or homestead claim attached and which were not known to contain mineral.

Respondents' claim is that, no exploration or examination having been made by the Government to ascertain whether the lands were mineral or non-mineral and no patent having been issued, an imperfect and defeasible title passed by the grant to the railroad company.

Our attention is invited to numerous cases decided by the Supreme Court of the United States and other courts wherein this and similar grants to railroad companies are construed. The language of these decisions seems to the writer of this opinion clear and unambiguous. By many it is declared that by their terms these grants import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described, and while the grant is in the nature of a "float," when the route of the road is definitely fixed the lands granted become susceptible of identification and the title attaches as of the date of the grant and has the same effect upon the
80 selected parcels as if they had been specifically described in the acts of Congress.

To me it seems there is much force in this contention of appellants. The Union Pacific railroad has been completed for more than a quarter of a century. The Government has not explored the lands to ascertain whether they contained minerals. There is nothing to evidence a purpose upon its part to make such exploration. The railroad was entitled to a patent as soon as the commissioners appointed by the President of the United States reported the completion and equipment of the road. The Supreme Court of the United States has declared in effect that patents are unnecessary to divest the United States of its title and invest the grantees therewith. Patents * * * "identify the lands as coterminous with the completed section, but they would be evidence

that as to that portion of the road the conditions of the grant had been complied with. * * * As deeds of further assurance, they would thus be of great value in giving quiet and peace to the grantee's possession."

St. Paul & Pacific R. R. Co. *vs.* Northern Pacific R. R. Co., 139 U. S., 1.

The decisions cited by appellants seem to have regarded the mineral reservations in these grants as reaching only such lands as were known to contain minerals at the time of the grant.

But it would be profitless to enter into a discussion of this phase of the subject and analyze the authorities collated, for the reason that they are ably considered and exhaustively treated by Mr. Justice Brewer in his dissenting opinion in the case of Barden *vs.* Northern Pacific Railway Company, 154 U. S., 332.

The writer of this opinion acknowledges the almost unanswerable arguments adduced by the learned justice, but recognizes that this court is bound by the majority opinion in that case. But it
81 must be confessed that this opinion cannot easily be reconciled with very many utterances of that high tribunal.

Appellants' counsel insist that the case last cited is not decisive of the point now under consideration. Counsel for respondent- contend with equal vehemence that under this decision until patent issues no indefeasible title to the lands within the grant passes to the grantees.

An examination of the grant to the Northern Pacific Railroad Company shows that the words there employed are almost identical with those found in the grant to the Union Pacific. The words in the former are: "To every alternate section of public land not mineral," and the following proviso is attached to the granting section of the act: "Provided that all mineral lands be, and the same are hereby, excluded from the operations of this act," etc.

Applying the doctrine enunciated in the Barden case, it would seem that at any time before exploration for minerals and the issuance of patent the Government can, upon the discovery of minerals within the land granted, not only refuse patent for such lands as contain mineral, but dispose of them to others than the grantee or its vendees, and that such grantee or vendees would not possess an indefeasible title to all the lands embraced within the grant. In the Barden case, just cited, the court held that the words quoted were an exclusive reservation of all minerals to the United States, and that it was immaterial whether there was knowledge of the existence of mineral deposits, if discovered at any time before patent passed from the Government.

Some of the cases upon which appellants rely are considered and explained. Speaking of the St. Paul & Pacific R. R. Co. *vs.* Northern Pacific R. R. Co., 139 U. S., and Deseret Salt Co. *vs.* Tarpey,
82 142 U. S., 241, the court say: "In both of these cases the writer of this opinion had the honor to write the opinion of this court, and it was never asserted or pretended that they decided anything respecting the minerals, but only that the title to the lands

granted took effect, within certain designated exceptions, as — the date of the grant. They never decided anything else. And what was that title? It was of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached. * * * It seems to us as plain as the language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. * * * Mineral lands were not conveyed, but by the grant of Congress itself and the subsequent resolution of Congress cited they were specifically reserved to the United States and excepted from the operations of the grant. Therefore they were not to be located at all, and if in fact located they could not pass under the grant. * * * When the act was passed it would have been impossible to state with any accuracy what parts of the tract contained minerals and what did not. That fact could only be ascertained after extensive and careful explorations. * * * The determination of the character of the land granted by Congress in any case, whether agricultural or mineral, is placed in the hands of the officers of the Land Department, whose action is subject to the revision of the Commissioners of the General Land Office, and an appeal lies from them to the Secretary of the Interior. Under their direction and supervision, the actual character of the land may be determined and fully established."

83 The court then quotes from the opinion of Mr. Noble, late Secretary of the Interior, in the case of the Central Pacific R. R. Co. *vs.* Valentine, 11 Land Dec., 238. The language is as follows: "Moreover, I am informed by the officers in charge of the mineral division of the Land Deaprtment that ever since the year 1867 * * * * it has been the uniform practice to allow and maintain mineral locations within geographical limits of railroad grants based upon discoveries made at any time before patent or certification where patent is not required."

It seems very clear from these decisions that, while the grant to the Union Pacific Company was one *in præsenti* and as to the lands embraced within its limits which were not within the exceptions or reservations, the title took effect upon identification as of the date of the grant; but as to lands containing minerals, whether known or unknown, no title passed, and the failure of the Government to explore or issue patents and the great lapse of time have not ripened a defective title into an indefeasible one. This being true, until patent issues there would be uncertainty as to the character of one's title. The land might be used exclusively for agricultural purposes; the grantee and its vendees might regard it as utterly devoid of mineral; men of science might unanimously agree that it was barren of mineral wealth, still it is possible mysterious nature may have impregnated the soil with its richest wealth.

While the patent does not change the character of the land, it is more than an assurance of title; it is conclusive evidence, when no fraud exists, that the Government regards the land as freed from

the reservation, and it is a remission of any claim the Government may possess by reason of mineral deposits upon the land.

84 There can be no doubt but what this view attaches an element of uncertainty to the land granted, as well as the holdings carved out of it.

Mr. Justice Brewer, in his dessenting opinion, says: "Take any particular mile of the road on either side of the line as located, there are twenty alternate sections within the place limits. By the rule now laid down (speaking of the majority opinion of the court) the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location and exploration develops the fact of minerals, and then it is declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter — *find* or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a[illegible] single tract."

It is claimed by c[illegible]sel for appellants that the supreme court of the Territory, in the [illegible] of Tarpey *vs.* The Deser-t Salt Company, 5 Utah, 495, decided th[illegible] all lands, whether surveyed and selected or not, within the grant limits, passed to the grantee, and clothed it with a perfect legal title.

An examination of that case does not fully sustain counsel's statement. The court regarded the grant as conferring a perfect legal title *in præsenti*, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the Government; but this declaration is somewhat modified by the expression, which is the important announcement in the opinion. It is this: "We think it is now beyond controversy that where the question is pre-

85 sented, as it is here, where no right of the Government reserved in the act making the grant is involved, it grants the legal title *in præsenti* to all the lands included in the grant, whether surveyed or selected or not."

A right of the Government is involved in the reservation found in the act of July 1, 1862. The minerals were reserved to the sovereign. We agree with this view, that, aside from the reservation in the grant, a legal title passed to the grantee for all the lands covered by the grant.

If the Union Pacific obtained a title less than fee-simple by this grant, and we think it did, the exact character of it is not now in question. We will observe, however, that under the authority of the Deseret Salt Company *vs.* Tarpey, *supra*, the delay in issuing patent or omission of the Government to explore and decide as to the mineral character of the lands would not prevent the grantee from occupying and holding the lands and maintaining possessory actions against trespassers.

A fee-simple estate is the largest in land known to the law. It is an absolute estate in perpetuity and excludes any qualifications, restrictions, or limitations.

From the foregoing it is apparent that if the lands in controversy in this case are devoid of minerals, then the grantee possesses a perfect legal title; if it contains minerals aside from coal and iron, the railroad company has no title whatever; yet, as above stated, the Barden case leads to the position that if there be undiscovered mineral when patent issues, the presumption becomes conclusive that it is barren of mineral wealth. The failure to discover minerals and the conclusiveness of this presumption confers an indefeasible title, though in fact deposits of mineral wealth may abound in greater quantities than in the famous El Dorado.

86 The railroad's title, then, to this land is subject to be defeated. At most its title is a base or determinable fee. It may be continuous forever or it may be determined at any moment, prior to the issuance of patent, upon the discovery of mineral.

And the case of Ankeny *vs.* Clark, 146 U. S., 345, supports the view announced in the case of Barden, viz., that until patent issues the title is imperfect in the grantee.

2. Respondents contend that, even if the title of the railroad company were free from imperfections, the various conveyances executed by it and its trustees and grantees did not pass a fee-simple title to plaintiffs. We think the evidence clearly establishes the truth of this contention. It is not necessary to examine all the defects in the chain of title between the railroad company and the defendants, but we will content ourselves with a single reference. In the deed from the railroad company to plaintiffs the following reservation appears: "Reserving, however, to the said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands, and to mine and remove the same if found, and for this purpose it shall have the right of way over and across said lands and space necessary for the conduct of said business thereon, without charge or liability for damage therefor."

This is an incumbrance, an easement, upon the land. The grantees did not protect it from invasions and trespasses as oft repeated as the grantor desired.

While the fee passed to the grantee, assuming that it was held by the grantor, it was a servient estate. The mere statement of the reservation suffices to show the incompleteness of the estate conveyed to plaintiffs.

87 But counsel insist that the deed executed by the railroad company on the second of November, 1891, cured this defect. The findings show that after the defendants had claimed a re-cis-ion of the contract because no fee-simple title passed to them, the railroad company executed a quitclaim deed to plaintiffs, wherein it released "all right, claim, * * * it may have in or to any coal which may thereafter be found upon or beneath the surface of said land, * * * it being the intention of this deed to relinquish any rights which the said Union Pacific Railway Company may have retained in said land by virtue of the coal reservation * * * included in said deed of October 18, 1889."

It will be observed that the company not only reserved the right

to enter upon the lands and prospect and mine for coal, but "other minerals within and underlying said lands." The quitclaim deed only relinquished the right to prospect and mine for coal. It is clear that even if the release had been in time—that is, prior to defendants' notice of rescis-ion—it is insufficient. It releases less than was reserved.

3. The finding of the referee upon this question was that the plaintiffs informed defendants that they owned and had a good title in fee-simple to 440 acres of land lying west of Ogden City, which said land so referred to was the land intended to be conveyed to defendants, and that the defendants had not seen said land and were not acquainted with the title, but that plaintiffs promised that they would furnish defendants with an abstract of title to said land; that defendants believed, relied, and acted upon the representations of plaintiffs, and, without investigating the title, purchased an undivided two-thirds interest therein which purchase defendants
88 would not have made if they had not believed said representations; that said representations were untrue. The conclusion of law based upon this finding is that the representations made to defendants concerning the title were untrue and a fraud in law upon the defendants.

Appellants contend that this finding and conclusion show that there was no "moral" fraud; that there was simply innocent misrepresentation as to title, and that where there is a partial failure of title or a defect therein, coupled with innocent misrepresentation as to such title, a court of equity will not rescind where the contract has been executed.

The learned counsel for plaintiffs insist that the findings and conclusions of law show that the plaintiffs are entirely exonerated from moral turpitude or anything that indicates *mala fides*. It is true there is no direct finding of a *scienter* in the misrepresentations, but it seems equally clear that plaintiffs are not wholly exculpated from wrong in the transaction. Plaintiffs knew that defendants had never seen the land, and that they were unacquainted with the title; they kn-w that the purchase was being made entirely upon their representations respecting the title and its indefeasibility. The conclusion of the referee is not equivalent to a declaration that the plaintiffs were innocent in their affirmations of the unimpeachable character of their title. But, conceding the construction placed upon the findings and conclusions of law above referred to as the correct one, the question presents itself whether under the facts there is ground for equitable relief in behalf of defendants. Counsel for appellants assume that the facts in this case show an executed contract, and learnedly argue that equity will not decree re-cis-ion of an executed contract in the absence of "moral" fraud, and that
89 where the contract is a warranty deed and it is executed by the necessary parties, the purchaser has no remedy, either in law or equity, in respect of defects in the title or quantity or quality of the estate which are not covered by the vendor's covenants.

If the facts in this case show an executory contract only, it is not necessary to the determination of this case that we decide

whether there is "legal," as distinguished from "moral," fraud, or what remedies are afforded the purchaser in executed contracts, where there is fraud or breach of covenants, because it is conceded when the contract is still executory the power of equity to decree rescission is ample.

Is the transaction between the parties to this suit an executed or executory contract? "A contract is executory when the thing agreed has not been done. It is executed when the thing has been done. * * * One who has begun to do what he promised, but has not finished, has executed his undertaking in part."

Bishop on Con., sec. 624.

Conceding that plaintiffs had a fee-simple title to the land intended to be conveyed, the deed contained a description of wholly different land. The land which defendants agreed to purchase was not conveyed. They contracted for a warranty deed to a certain tract of land. The contract was not fully performed by plaintiffs. It was executory. The writing or deed amounted only to a contract to convey the land which plaintiffs claimed to own, and in equity would be enforcible, and, if the evidence was sufficient, would warrant a decree of specific performance. It was a contract executory, conveying a chose in action, not a contract executed, conveying a chose in possession.

90 2 Blackstone Com., page 443.

McDonald *vs.* Hewitt, 15 Johns. Ch., 349.

No right *in rem* was created; the only rights existing were *in personam*. If the contract between the parties had been executed, they would no longer have been bound by a contractural tie; rights would have been acquired in property which would have extinguished the contract. But we find plaintiffs asking for reformation of the contract, showing that it was incomplete, executory; that the rights were *in personam*. They were seeking to enforce a chose in action.

"An executory contract is one in which a party binds himself to do or not to do a particular thing."

Fletcher *vs.* Peck, 6 Cranch, 137.

Plaintiffs' warranty deed was a contract, in which they bound themselves to convey the land defendants agreed to purchase, but parol evidence would be required to establish the correct description. It was a defective deed, containing land which neither of the parties understood was conveyed or agreed to convey; it was therefore only a contract to convey, and was executory. A defective deed is an executory contract, and "it is a familiar rule that a defective deed may be treated in equity as an agreement to convey and performance enforced, and where it is we think * * * * that it stands on the same footing as an executory contract to convey."

Hanson *vs.* Nichelsen, 19 Wis., 535.

Petesch *vs.* Hambach *et al.*, 48 Wis., 447.

Eaton *vs.* Eaton, 15 Wis., 284.

Mastin *vs.* Halley, 61 Mo., 200.

Fitch *vs.* Gosser, 54 Mo., 274.

91 In the case of Hunt *vs.* Admrs. of Rousmaniere, 1 Peters, 13, the court say: "There are certain principles of equity applicable to this question which as general principles we hold to be incontrovertible. The first is, that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, in writing or by parol, previously entered into, but which by mistake of the draughtsman, either as to equity or law, does not fulfill or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction, and if the instrument which intended to execute the agreement be for any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement."

And in the case of Walden *vs.* Skinner, 101 U. S., 585, this language is adopted and the principle reaffirmed.

In the case of Conrad *vs.* Schwamb, 10 N. W. Rep., 396, plaintiffs brought an action to recover a tract of land. A deed had been executed to defendant, the grantors intending to convey certain land in fee, but by mistake it was described as being in a different quarter section. The court say: "The deed * * * although it did not convey the land intended, must be treated in equity as an executory contract * * * to convey such land. * * * Hence * * * Schwamb might have maintained an action against Felton * * * to compel Felton specifically to perform his executory contract to convey the land claimed, so far as he could perform it."

92 And the quitclaim deed correctly describing the land tendered to defendants after the discovery of the mistake in the first deed did not answer the contract and fully execute it. Besides, the defendants had, a few days prior thereto, elected to rescind the contract, and had demanded back the amount paid and the surrender of the notes held by plaintiffs.

From the foregoing authorities we are of the opinion that the facts in this case do not constitute an executed contract; the transaction between the parties, we think, evidences an executory contract, and that equity has power to decree a rescission.

We are not determining what *mala praxis* is sufficient to entitle one to rescind an executed contract, for, as stated, the transaction in this case shows an executory contract, and we believe the rule to be well settled that material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertance, when relied on and become the foundation of the active relations between the parties, operate as a "surprise and imposition" and constitute such fraud as will move a court of equity to decree a rescission of an executory contract."

1 Story Eq., sec. 193.
1 Beach Eq. Juris., secs. 69, 93.
Bishop on Con., sec. 662.
Clark on Con., p. 339.

2 Pom. Eq. Juris., secs. 883, 887, 888.
Dorry *vs.* Peck, L. R., 14 App. Cas., 337.
Arkwright *vs.* Newbold, L. R., 17 Ch. Div., 320.
Traell *vs.* Baring, 4 D. C., J. & S., 318.
Ship *vs.* Criskill, L. R., 10 Eq., 73.
Cooley on Torts (2 ed.), p. 582.
Hexter *vs.* Bast, 125 Pa. St., 52.
Chatham Furnace Co. *vs.* Moffatt, 147 Mass., 483.
Wells *vs.* McGrooch, 71 Wis., 196.
Defrees *vs.* Carr, 33 Pac. Rep., 217.
Cotzhausen *vs.* Simon, 47 Wis., 106.
Grant *vs.* Law, 29 Wis., 99.
Knowlton *vs.* Amy, 47 Mich., 204.
Bullitt *vs.* Farrarr, 6 L. R. Ann., 149.
Litchfield *vs.* Hutchinson, 117 Mass., 195.
Smith *vs.* Richards, 13 Pet., 26.
2 War. on Vend., sec. 18.

93 "As a rule, all representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for a rescission, even though they may have been made without fraudulent intent."

3 War. on Vend., sec. 18.
Allen *vs.* Hart, 72 Ill., 104.
Bennett *vs.* Judson, 21 N. Y., 238.
Mulvey *vs.* King, 39 Ohio St., 491.
Wilcox *vs.* Wes. Uni., 32 Ia., 369.
Alvarez *vs.* Brannan, 7 Cal., 503.

The facts in this case show that the representations of plaintiffs as to the character of their title to the land were more than mere expressions of opinion. They were affirmations of a material fact and inducements to the contract. Being untrue and material, they are fraudulent.

Cressler *vs.* Rees, 27 Neb., 515.
Conlan *vs.* Roemer, 52 N. J. L., 53.

4. There is no controversy in regard to the materiality of the representations made respecting the title, nor is it contended that defendants did not act in due season in giving notice of the rescission after the discovery of the defect in the title; but plaintiffs urge that, the defendants not having tendered back a deed of the property conveyed, there was no rescission. The rule is, no doubt, that the parties must be placed in *statu quo* before a rescission can be effectuated. Having decided that the warranty deed executed by plaintiffs was merely an executory contract, it follows that defendants had nothing to return to plaintiffs in order to place them in *statu quo*. The referee found that the land described in the warranty deed was not owned by plaintiffs, and the conveyance executed by
94 them certainly created no cloud upon the owner's title, if there was an owner. Plaintiffs conveyed nothing to defend-

ants; their deed was worthless, except that it might be the basis of an action in equity for specific performance, or the foundation of a suit at law, after reformation, for a breach of the vendor's covenants. Plaintiffs having parted with nothing of value, defendants had nothing to return; and in such cases the failure to tender that which was valueless cannot be interposed to prevent a rescission of the contract.

Bishop on Con., sec. 679.

The referee finds that the defendants never actually occupied any of the land sought to be conveyed, but that plaintiffs were in possession of the same.

We think that the record clearly discloses that the defendants did all that was required by law upon their part in order to justify a decree of rescission by the court.

We find no error in the record and therefore affirm the judgment of the lower court with costs.

We concur.

MERRITT, *C. J.*

I concur in the result.

BARTCH, *J.*

Marked: Filed June 3, 1895.

95 UNITED STATES OF AMERICA, *88:*

To Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within 60 days from the date of this citation, pursuant to an appeal allowed in the supreme court of the Territory of Utah, wherein Louis B. Adams and Watson N. Shilling were appellants and you, the said Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed, were respondents, to show cause, if any there be, why the judgment rendered in said supreme court on the 3rd day of June, A. D. 1895, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Samuel A. Merritt, chief justice of the Territory of Utah, this the 8th day of July, A. D. 1895.

[Seal Supreme Court, Territory of Utah, United States of America.]

SAMUEL A. MERRITT,
Chief Justice of Utah.

Attest:

JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

Service of a copy of the above citation is hereby admitted this 10th day of July, A. D. 1895.

RICHARDS & MACMILLAN &
H. H. HENDERSON,
Attorneys for Appellees.

[Endorsed:] Filed in the supreme court Jul· 11, 1895, at Salt Lake City, Utah. Joseph P. Bache, clerk.

96 In the Supreme Court of the United States.

LOUIS B. ADAMS and WATSON N. SHILLING, Appellants,
vs.
HIRAM H. HENDERSON, GEO. H. BURGITT, Administrator of the Estate of Edward A. Reed, Deceased, and Millie G. Reed, Appellees.

Assignment of Errors.

Come now the appellants above named and allege that the supreme court of Utah Territory erred in this action in affirming the judgment of the fourth district court of said Territory for the following reasons:

I. Because the evidence is insufficient to justify that part of the third finding of fact in the words and figures following, to wit: "That the representations made by Adams and Shilling, as aforesaid, to said Reed and Henderson were untrue," in this: that the evidence did not and does not show that Adams and Shilling did not have a good and indefeasable estate in fee-simple to the land described in finding of fact No. II.

II. Because the evidence is insufficient to justify the second
97 finding of fact, in this: that the evidence did not and does not show that the defendants Reed and Henderson or either of them rescinded the contract of sale between themselves and plaintiffs.

III. Because the conclusion of law No. II is against law and contrary to findings of fact, in this: that the evidence does not show that the plaintiffs did not or do not now have a good title in fee-simple to the lands described in conclusions of law No. I, or that the notes mentioned in said conclusion No. II are without consideration.

IV. Because the third conclusion of law is against law, in this: that the findings of fact do not show that the representations by plaintiffs to Reed and Henderson concerning the title to the land intended to be conveyed by them were untrue.

V. Because the fourth conclusion of law is against law, in this: that the findings of fact do not show that the title of the Union Pacific Railway Company to the lands described in finding of fact No. II was not good, or that it was encumbered, or that it may be defeated at any time by the United States.

VI. Because the fifth conclusion is against law, in this: that the findings of fact do not show that Hiram H. Henderson and George H. Burgitt, guardian of E. A. Reed, or either of them, are entitled

to recover of plaintiffs the promissory notes or money mentioned in said conclusion of law.

VII. Because the last two conclusions of law are against law,
98 in this: that the findings of fact do not show and the evidence does not show that the quitclaim deed of November, 1891, did not release the right of the Union Pacific Railway Company to enter upon the land *and* intended to be conveyed to explore for minerals other than coal, and the findings of fact or the evidence did not show that the United States retained the right to explore or authorize the exploration of the lands intended to be conveyed for minerals other than coal.

VIII. The court erred in its second conclusion of law, in this: that neither the findings of fact nor the evidence shows that the plaintiffs did not, do not now, and never did have a good title in fee-simple to the lands described in conclusion of law No. I, or that the several notes given by the defendants to the plaintiffs mentioned in conclusion of law No. II or that either of them were given without consideration.

IX. The court erred in making the third conclusion of law, in this: that neither the findings of fact nor the evidence show that the representations made by the plaintiffs concerning the title to lands described in conclusion of law No. I were untrue or a fraud in law upon the defendants or either of them.

X. The court erred in its fourth conclusion of law, in this: that neither the findings of fact nor the evidence showed or show that the title of the Union Pacific Railway Company to the land in controversy (being the land described in conclusion of law No. I) is not or was not a good title, or that it was encumbered, or that it could or might he defeated at any time by the United States before the issuance of patent.

99 XI. The court erred in its fifth conclusion of law, in this: that neither the findings of fact nor the evidence shows that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, or either of them, are entitled to recover from the plaintiffs in this action the promissory notes or money mentioned in conclusion of law No. V.

XII. The court erred in the last two conclusions of law, in this: that the quitclaim deed mentioned in the next to last conclusion of law does not show that the Union Pacific Railway Company did not release its right to enter upon the land in said conclusion of law described and explore the same for minerals other than coal.

XIII. Because neither the findings of fact nor the evidence shows that the United States held or retained the right to explore or authorize the exploration of said land for minerals other than coal.

KIMBALL & KIMBALL,
BENNETT, MARSHALL & BRADLEY,
P. L. WILLIAMS,
Attorneys for Appellants.

[Endorsed:] Louis B. Adams *et al.*, appellants, *vs.* Edward A. Reed *et al.* Assignment of errors. Filed in the supreme court Jul-11, 1895, at Salt Lake City, Utah. Joseph P. Bache, clerk.

100 In the Supreme Court of the United States.

LOUIS B. ADAMS and WATSON N. SHILLING, Appellants,
vs.
HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of the Estate of Edward A. Reed, Deceased, and Millie G. Reed, Appellees.

Know all men by these presents that we, Louis B. Adams, Watson N. Shilling, Lars M. Nelson, and Louisa M. Adams, of Ogden, Utah, are held and firmly bound unto Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed in the sum of three hundred dollars, to be paid to the said Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased. and Millie G. Reed, their and each of their executors, administrators, or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 6th day of July, 1895.

Whereas the above-named Louis B. Adams and Watson N. Shilling have taken an appeal to the Supreme Court of the United States to reverse the judgment of the supreme court of the Territory of Utah in a certain action wherein the said Louis B. Adams and Watson N. Shilling were appellants and said Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed,
101 deceased, and Millie G. Reed were respondents:

Now, therefore, the condition of this obligation is such that if the above-named Louis B. Adams and Watson N. Shilling shall prosecute their said appeal to effect and answer all costs if they shall fail to make good — plea, then this obligation to be void; otherwise to remain in full force and virtue.

LOUIS B. ADAMS. [SEAL.]
WATSON N. SHILLING,
By L. B. ADAMS. [SEAL.]
LARS M. NELSON. [SEAL.]
LOUISA M. ADAMS. [SEAL.]

Signed, sealed, and delivered in the presence of—
G. P. McCABE.
G. N. KIMBALL.

TERRITORY OF UTAH, } ss:
County of Weber, }

Lars M. Nelson and Louisa M. Adams, the sureties who are named in and who executed the foregoing bond, being severally sworn, each for himself deposes and says:

That he is a freeholder in said county of Weber and worth the amount specified in said bond as the penalty thereof over and above all his debts and liabilities, exclusive of property exempt from execution.

LARS M. NELSON.
LOUISA M. ADAMS.

Subscribed and sworn to before me this 6th day of July, 1895.

GORDON N. KIMBALL,
Notary Public.

[SEAL.]

Marked: Filed in the supreme court July 8th, 1895, at Salt Lake City, Utah. Joseph P. Bache, clerk. Approved July 8th, 1895. Merritt, chief justice.

102 UNITED STATES OF AMERICA, } *ss:*
Territory of Utah, }

I, Joseph P. Bache, clerk of the supreme court in and for the Territory of Utah, in pursuance of an appeal allowed in the case of Louis B. Adams *et al.*, as appellants, and Edward A. Reed *et al.*, as respondents, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, bond and assignment of errors, and original citation, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, and bond is a full, true, and complete copy of the several originals thereof on file and of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 5th day of August, A. D. 1895.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 16,057. Utah Territory supreme court. Term No., 360. Louis B. Adams and Watson N. Shilling, appellants, *vs.* Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed. Filed October 9th, 1895.

No. 70.

Brief of Dillon, Anderson & Williams for Appellants.

FILED
OCT 26 1897
JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Oct. 26, 1897.

No. 70.

LOUIS B. ADAMS and WATSON N. SCHILLING,
Appellants,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A. Reed, deceased, and MILLIE G. REED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF SUBMITTED ON BEHALF OF ADAMS AND SCHILLING, APPELLANTS.

P. L. WILLIAMS,
KIMBALL & KIMBALL,
Attorneys for Appellants.

JOHN F. DILLON,
E. ELLERY ANDERSON,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 70.

LOUIS B. ADAMS and WATSON N. SCHILLING,
Appellants,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A. Reed, deceased, and MILLIE G. REED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF SUBMITTED ON BEHALF OF ADAMS AND SCHILLING, APPELLANTS.

Statement of Facts.

In March, 1890, appellants Adams and Schilling agreed to sell and convey an undivided two-thirds interest in certain lands in Weber County, Utah Territory, to Edward A. Reed and Hiram H. Henderson for the sum of $7,333.32.

In pursuance of this agreement Adams and Schilling, with their respective wives as grantors, executed and

delivered to Reed and Henderson, as grantees, the deed in which the property to be conveyed was described as follows :

"An undivided two-thirds of the east half of section nine, township six north, of range two west, of the Salt Lake meridian ; also, an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section."

See Referee's Findings I. and IV., pp. 18 and 19.

By mistake of the scrivener, who prepared the deed, the premises to be conveyed were described as lying in township six, instead of being described as lying in township five.

See Finding VI., page 19.

Both grantors and grantees understood that the property which the grantors agreed to sell and which the grantees agreed to buy was located in township five.

See Findings I. and II., page 18.

The said defendants Reed and Henderson, at the time of receiving said deed mentioned in Finding No. IV., paid to the plaintiffs Adams and Schilling one-third the purchase price of the land intended to be purchased—to wit, two thousand four hundred and forty-four and $\frac{44}{100}$ dollars of the purchase money—in cash, and executed their two certain promissory notes in favor of Adams and Schilling for the sum of two thousand four hundred and forty-four and $\frac{45}{100}$ dollars each, bearing eight per cent. interest and payable one year and six months from March 26, 1890; which said notes were secured by a mortgage back on the same land for the residue of the purchase money; which land was also described in said mortgage, by mistake of the scrivener who prepared the same, as lying in township six instead of township five north, of range

two west, of the Salt Lake meridian, when it was intended to be described as lying in said township five.

See Finding VII., page 19.

The lands which the grantors and grantees both had in mind when the contract was made and when the deed was delivered are in Weber County, Utah, and are within ten miles of the line of the Union Pacific Railroad, and are within the limit of lands granted to the Union Pacific Railroad Company by the Act of Congress of July 1st, 1862. These lands are and have been heretofore used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch Mountains.

See Finding XI., page 20.

The title of Adams and Schilling to the lands in question was derived from the Union Pacific Railroad Company through various mesne conveyances, by means of which the entire title which the Union Pacific Railroad Company had was vested in Adams and Schilling at the time of the contract and conveyance to Reed and Henderson.

See Findings XXIV. and XXV., page 24.

The only possible qualification to this proposition is whether the release from the Union Pacific Railroad Company referred to in Finding XXIII. on page 24, was a complete and sufficient release of what is called "the coal reservation," referred to in Finding XXII., page 24.

This subject will be further discussed in Point V.

On or about the 3d day of September, 1891, Reed and Henderson, having ascertained that Adams and Schilling were not the owners of the land described in the deed which had been delivered to them —that is to say, were not the owners of land in township six— stated orally to Adams and Schilling that they rescinded the said contract of sale, and demanded

back from the said grantors the sum of $2,444.44, with interest, and also demanded a surrender of any outstanding notes and a reimbursement of all amounts paid by them for interest under the said contract.

See Findings XIX. and XX., page 23.

This alleged rescission was not, however, accompanied by any tender of reconveyance from Reed and Henderson, the grantees, to Adams and Schilling.

Shortly thereafter, and on or about September 29th, 1891, Adams and Schilling tendered to Reed and Henderson another deed to them, a special warranty deed, which contained a proper description of the land intended to be conveyed, and which deed Reed and Henderson refused to receive, declaring that they had rescinded the contract of sale.

See Finding XXI., page 23.

On April 16th, 1867, the Union Pacific Railroad Company mortgaged its land grant, including the premises in question, to Cyrus H. McCormick and John Duff, as trustees, to secure the payment of ten million dollars. By the terms of the mortgage the trustees were empowered to release the lien of the mortgage upon any particular tract or parcel of land.

On December 18th, 1873, the Union Pacific Railroad Company mortgaged its land grant, including the said premises, to the Union Trust Company of New York, as trustee, with similar power to release. The mortgage to the Union Trust Company further provided that the trustees under the said first mortgage to McCormick and Duff had power and authority to release the lien created by the mortgage to the Union Trust Company by joining in the deed with the Union Pacific Railroad Company.

See Finding XII., pages 20 and 21.

The Union Pacific Railroad Company by warranty deed dated December 11th, 1883, and recorded February 4th, 1885, conveyed to William Van Dyke the

northwest quarter of the northeast quarter of section nine, township five north, of range two west, of the Salt Lake meridian, being part of the premises involved in this action.

The Union Pacific Railroad Company by warranty deed dated July 2d, 1887, conveyed to John Selman the northeast quarter of the northeast quarter of section nine, township five north, of range two west, of the Salt Lake meridian.

See Findings XIV. and XV., page 21.

Frederick L. Ames, the sole remaining trustee under the first mortgage above referred to to McCormick and Duff, united with the Union Pacific Railroad Company in these two conveyances, and thereby the said lands were released from the lien of the two mortgages above mentioned.

See Finding XV., page 21.

On January 22d, 1886, William Van Dyke by warranty deed conveyed to Adams and Schilling the northwest quarter of the northeast quarter of said section nine, township five north, of range two west, of the Salt Lake meridian, and on the 27th of September, 1887, John Selman by warranty deed conveyed to Adams and Schilling the northeast quarter of the northeast quarter of said section.

See Finding XV., page 21.

On the 18th day of October, 1889, the Union Pacific Railroad Company and the Union Trust Company conveyed directly to Adams and Schilling the south half of the northeast quarter, the east half of the southwest quarter and the southeast quarter of section nine, township five north, of range two west.

On the 4th day of June, 1888, the Union Pacific Railroad Company and Frederick L. Ames, trustee, conveyed directly to Adams and Schilling the southwest quarter of the southwest quarter of said section nine.

See Finding XVI., page 22.

The deeds from Van Dyke, Selman and the Union Pacific Railroad Company contained in their respective descriptions all of the premises involved in this litigation.

No patent has ever issued from the Government for the land intended to be conveyed by Adams and Schilling to said Reed and Henderson in township five, section nine north, of range two west, of the Salt Lake meridian.

See Finding XVIII., page 22.

This action was brought by the sellers Adams and Schilling against the purchasers Reed and Henderson for the purpose of having the mortgage reformed and corrected, so as to describe the property as being in township five, instead of township six, and for a foreclosure of the mortgage reformed in manner aforesaid.

See Prayer for Judgment, pages 7 and 8.

The defendants by answer deny that the said Adams and Schilling are the owners of the property intended to be sold to the defendant, and also allege that the sellers represented their title to these lands to be good and that the purchasers bought the lands on the faith of such representations.

The defendants also allege that they, upon the discovery of the mistake in the deed, and before the tender of the new deed, elected to rescind the said contract, and demanded back the purchase money.

The defendants have also filed a cross-bill, setting forth these same matters, and asking by way of relief that their said mortgage and outstanding notes be canceled, and that they have judgment against the plaintiff for the amount of payments heretofore made by them.

See Record, pages 13, 14 and 15.

The case was heard before JACOB S. BOREMAN, as Special Master in Chancery and Referee, and he re-

ported in favor of the defendants and against the plaintiffs.

See his Findings of Fact and Law, pages 18 to 26.

Upon these findings the District Court for the Territory of Utah passed final judgment in favor of the defendants and against the plaintiffs, declaring the contract of sale for the premises in question to be null and void, declaring the mortgage given to secure the balance of the purchase money to be null and void, and adjudging that the defendants recover against the plaintiffs the sum of $3,520 with interest at the rate of eight per cent.

See page 27 of Record.

Upon a case containing the judgment roll and all the evidence plaintiffs Adams and Schilling appealed to the Supreme Court of the Territory of Utah. On this appeal the judgment appealed from was affirmed. The opinion of affirmance is contained in the Record, pages 47 to 57.

This is an appeal taken by Adams and Schilling from the judgment of the Supreme Court of the Territory, now State, of Utah.

The pleadings and the exceptions taken and the conclusions of law present the following three questions:

First. Did the sellers Adams and Schilling have title to the said premises at the time of the sale by them to Reed and Henderson?

Second. Was the title of Adams and Schilling in any manner encumbered at the time of the sale?

Third. Did the sellers Adams and Schilling make such fraudulent and false representations as to their title to the purchasers Reed and Henderson as would justify the purchasers in rescinding the sale and recovering the purchase money paid by them?

ARGUMENT.

POINT I.

The sellers Adams and Schilling had good title to the premises in question at the time of the sale to Reed and Henderson.

The title of Adams and Schilling, as we have seen, was either derived directly from the Union Pacific Railroad Company or indirectly from that company through grantors Van Dyke and Selman. The lands were included within the Union Pacific land grant conferred upon that company by the Act of July 2d, 1862. It is entirely settled that, by the terms of this act and subject to the exceptions therein contained, there was granted to the Union Pacific Railroad Company an immediate legal title to the lands referred to in the grant, which lands became fixed as to metes and bounds by the location of the road.

Deseret Salt Company vs. Tarpey, 142 U. S., 241.
Schulenberg vs. Harriman, 21 Wall., 44.
Railroad Company vs. United States, 92 U. S., 733.
Railroad Co. vs. Railroad Co., 97 U. S., 491.
Railroad Co. vs. Baldwin, 103 U. S., 426.
Grinnell vs. Railroad Co., 103 U. S., 739.
Wright vs. Roseberry, 121 U. S., 488.
Rutherford vs. Green Heirs, 2 Wheaton, 196.

The respondents, while conceding that the legal title *in presenti* passed, by the terms of the act, to the Union Pacific Railroad Company, take the ground that under the principle of the case of Barden vs. the Northern Pacific Railroad Company, 154 U. S., 288, the title of the Union Pacific Railroad Company to the whole of its land grant is open to question, and is not

such a title as will satisfy a contract to convey land by a good title. Their contention is that, under the decision quoted, the discovery of mineral upon any portion of the land grant at any time in the future will avoid the grant of the railroad company. It therefore follows that this element of uncertainty, this gift in fee, liable to be defeated by the discovery of mineral, is not such a title as was stipulated for in the agreement of sale between Adams and Schilling as sellers, and Reed and Henderson as buyers.

We submit at the very threshold of the argument that the case of Barden vs. Northern Pacific Railroad Company does not establish any such principle. It was in that case *conceded that the lands in question were mineral lands.* The only question involved in that case was whether the exception of mineral lands contained in the grant should be limited to lands known to be mineral at the time of the grant, or whether the exception should extend to lands at any time in the future ascertained to be mineral. The Court decided that the exception extended to all mineral lands, whenever ascertained to be of that character, but it does not follow that the company had no title in fee simple to any portion of its land because mineral lands are excepted, whether known to be such at the time of the grant, or ascertained to be such at a later date.

It is a matter of common notoriety that will not be disputed that an enormous proportion of the lands granted contain no mineral. This is true as to substantially all the lands in Nebraska and Kansas, and a very large proportion of the lands in Wyoming and Utah.

The question, therefore, to be passed upon in the case at bar is whether, under the rules of evidence and principles applicable to actions brought for the rescission of contracts, the title of the Union Pacific Railroad Company should be considered bad because of the possibility of the lands in question being embraced within the exception of the statute, or whether, by the

rules of evidence applicable to such cases, the title of the railroad company must be considered good until the party seeking to rescind and avoid his contract establishes by evidence that the lands in question contain mineral, and are, therefore, excepted from the grant.

Clearly, if the lands are not mineral a great injustice is done by a decree which rescinds the contract and awards judgment in favor of the purchaser to recover the amounts paid by him, and declares the securities he has given to be void.

The exception of mineral lands in no manner affects the nature of the railroad's title to lands which are not mineral. The exception merely refers to a geographical location of lands of a certain character, as to which the grant does not become operative. The Court cannot, therefore, assume that the exception in question applies to the lands in controversy unless the case contains some evidence upon which that assumption can be based.

This appeal, the Court will bear in mind, is from a decree declaring the contract between the perties to be void, declaring the mortgage given to secure part of the consideration to be void, and declaring the purchasers to be entitled to recover from the sellers the moneys paid for the lands sold.

It is impossible to sustain these conclusions unless it be assumed that in an action to rescind the contract the plaintiff is entitled to recover, unless the defendant not only proves affirmatively that he has title to the lands, but disproves any transaction, exception or occurrence whatever by which the title so acquired might be affected or impaired.

Before referring to the authorities which determine the presumptions of law applicable to actions for the rescission of contracts, we desire to call the Court's attention to the widespread disaster which would result to titles innumerable if the rules were as above stated.

The Union Pacific Railroad Company, the Northern Pacific Railroad Company, the Central Pacific Railroad

Company—in short, all the railroad corporations which have received land grants from the Government of the United States—have conveyed innumerable tracts of land to a vast number of grantees, who in turn have conveyed the premises so acquired by them to subsequent grantees, and in whom the title is now vested.

It is entirely within limit to say that the titles so held represent over one hundred thousand transactions in all of which the original title is derived from a railroad land grant. The exception of mineral lands is contained in all these grants. If, therefore, it be true that the existence of this clause or exception is sufficient to entitle a present holder to a rescission of the contract of purchase under which he now holds and to recover back his purchase money, the entire line of intermediate grantors and grantees between the railroad company and the present holders are exposed to innumerable litigations in which they will be absolutely without defense and necessarily compelled to refund all proceeds received by them on the sale of these lands to every present holder who by reason of declining prices elects to rescind his purchase. We say advisedly that the defendants in these innumerable litigations would be defenseless because it would be impossible for them to prove that the lands in question were not mineral. An exploration to the depth of twenty feet will be insufficient because the mineral might be discovered at a lower level. An exploration of ten acres out of a section would be insufficient because mineral might be discovered in the remaining portion of the section. The expense involved in explorations of this nature would vastly exceed the value of all agricultural lands; in fact, in many cases, as is well known, it more than exhausts the value of mineral lands. What relief then is open to the unfortunate seller when confronted with the proposition that because the lands he has sold in good faith may possibly be discovered to be mineral lands he must surrender the proceeds of sale and be adjudged to have

forfeited all rights under his contract. Nor is this the whole extent of the misfortune which must result from the establishment of so severe and arbitrary a rule.

The railroad companies which were the origin of the title have substantially all in the lapse of time become insolvent, have passed through receiverships and been reorganized through the agency of new corporations. The obligations of these new corporations do not extend to the corporate liabilities of the insolvent corporations which have passed out of being, so that while endless recoveries would occur as between the grantees respectively no final satisfaction could be had against the corporations themselves.

Unless some unbroken line of decisions compels this Court to adopt the principle of presuming against the validity of the title of the grantor in cases of this nature, we submit that the true rule applicable to actions for the rescission of contracts is that the party seeking the rescission must bear the burden of proving that the title of his grantor is bad.

For the purposes of this appeal, the case at bar must be considered as an action in which Reed and Henderson are plaintiffs and Adams and Schilling are defendants. The mistake in reference in the original deed to township six instead of township five being conceded to have been a mere accident or error of the clerk who drew the deed and it being conceded that both grantors and grantees understood and intended that the lands conveyed by the deed were actually in township five, it follows that the right to have the deed and mortgage reformed, if the case presented no other question whatsoever, is beyond dispute. In like manner, if no propositions affecting the title of Adams and Schilling were contained in the case, the right of Adams and Schilling to a foreclosure of their mortgage would be beyond question.

It, therefore, follows that on the issue litigated; that is, the right to a rescission of the contract, to a cancellation of the securities and to recover by judgment

the amounts paid, depends upon a cause of action in favor of Reed and Henderson and against Adams and Schilling.

In so far as the question of the nature of the title of the Union Pacific Railroad Company to the lands in question is concerned, the only finding of the Referee which bears on this point is finding XI., on page 20, which is as follows:

> "That the lands described in finding two are in Weber County, Utah, and are within ten miles of the line of the Union Pacific Railroad, and are within the limit of lands granted to the Union Pacific Railroad Company by the Act of Congress of July 1st, 1862; that the lands in controversy are, and have been heretofore, used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch Mountains, and that no exploration nor examination has ever been made on said lands for coal or minerals of any kind or description."

The conclusion of law which is based upon this finding is contained on page 25, numbered 2, and is as follows:

> "2. That the plaintiffs have not now, nor never did have, a good title in fee simple to the above-described land, and that the several notes given by the defendants to the plaintiffs, including the note given to the bank and the sums of money paid by defendants to the plaintiff, were all without consideration."

We submit that the finding of fact, taken in connection with the terms of the grant contained in the Act of July 2d, 1862, is not sufficient to support the conclusion of law and the decree which is thereupon based, and that for this reason the decree should be reversed, and the case remanded for a new trial.

POINT II.

In an action to rescind a contract relating to the sale of real estate based upon an allegation that the seller has not such title as he contracted to convey, the burden of proof is on the party seeking to rescind.

It is a principle of universal application that the burden of proof rests upon the party asserting a right.

In so far as the decree appealed from declares the contract between the parties to be not binding and adjudges that the defendant, the purchaser, shall recover the purchase money which the plaintiff, the seller, had received from the defendant, it is the defendant who asserts the right to recover and it is upon the defendant that the burden of proof must rest.

Courts will not interfere to take property from one and give it to another without requiring the claimant to establish his right to the relief claimed by sufficient proof.

Sufficient proof means proof which satisfies the Court that the facts upon which the alleged right depends are true.

If the proofs offered are equally consistent with the existence as with the non-existence of the facts upon which the alleged right depends, the party on whom the burden of proof rests must fail.

In the case under consideration, the question of fact upon which the alleged right of Reed and Henderson to recover the purchase money paid to Adams and Schilling is the question whether the lands intended to be conveyed were excepted from the grant of the United States to the Union Pacific Railroad.

The proofs offered, as shown by finding XI., are that the lands are included within the limits of the grant,

that they have been used as agricultural lands and that no exploration has ever been made on said lands for minerals.

But these facts are quite as consistent with the conclusion that the lands are agricultural, and therefore included in the grant, as they are with the conclusion that the lands are mineral and therefore excluded.

We say quite as consistent, but in point of fact if we should test the question by the proportion of mineral lands to agriculture it would be safe to say that it was a thousand to one that the lands are in fact agricultural.

Is it just that a purchaser should have judgment for purchase money paid against a seller without actual proof that the seller is in default?

The above proposition as to the burden of proof is entirely elementary and hardly requires citation of authorities.

See

1 Greenleaf on Evidence, Section 74.
Stevens on Evidence, Article 93.
Baylie on *Onus Probandi*, 65.

The most favorable view of the right of Reed and Henderson to the judgment appealed from is that their right to rescind rests upon the allegation that their grantor was not seized of title at the time of such conveyance, and that in an action for breach of the covenant of seizin the burden of proof is on the grantor to establish his title.

This was at one time the rule of law applicable to actions for breach of the covenant of seizin, but the reasons for the rule have ceased to exist and the rule itself has been repudiated in very many cases.

Woolley vs. Newcombe, 87 *N. Y.*, 603.

In this case the Court reviews numerous old cases holding that in actions for breach of the covenant of seizin where no evidence was offered on either side

except the deed from the grantor to the grantee, the grantee was entitled to judgment.

At page 611 of this case the Court explains that the reason for this rule is to be found in the system of conveyancing prevalent in England when the rule was established. It is founded on the fact that deeds and muniments of title generally covered large tracts, and the owners of estates retained them in their possession, thus keeping to themselves and under their control all the evidence which would establish their title and their seizin. In these circumstances it was thought not unreasonable to require the grantor in an issue of seizin to assume the burden of proof. On page 612 the Court says:

> "Under these customs and this state of the law, and before the recording acts, it is easy to understand why it should be held that in an action on the covenants of seizin the vendor was bound to disclose his title. He was allowed to retain the evidence thereof for the very purpose of answering to these covenants. It is equally manifest that under our present system of conveyancing and making the title to real estate matter of public record as accessible to the vendee as to the vendor, the reason for the former rule entirely fails."

Under the principle of this case, the burden of proof must be held to rest on the grantee. The proof of the seizin of Adams and Schilling does not depend upon title deeds in their possession or upon any muniments of title which they control. It depends solely on the question of fact whether the land does or does not contain mineral. The grantor, therefore, cannot satisfy the burden if it is cast upon him, except by actual proof that the land does not contain mineral, which is substantially impossible. The grantee, on the other hand, can prove that Adams and Schilling were not seized by proving that the land is mineral, and if this

were in fact the case the production of the proof would not be difficult. If the burden of proof in cases of this character is cast upon the grantor, uncertainty will be cast upon the vast number of titles which have been derived through the various railroad grants, titles will become insecure and will cease to be available as the basis for loans, and in times of depression or of falling values all grantees will be enabled at any time, either to recover from their grantors in actions for breach of the covenant of seizin or to rescind contract for the sale of land and to recover the purchase money paid. The production of a deed from a grantor to a grantee, without further proof, will be sufficient to entitle the grantee to a judgment that the grantor was not seized at the time of the conveyance. The grantor cannot protect himself, except by actual proof that the land is not mineral, which proof, except by expensive and exhaustive explorations, it would be impossible to procure.

On this point we also cite :

Mathias vs. Tennessee R. R. Co., 83 Alabama, 411.

In this case there was a land grant to the State of Alabama to aid in the construction of certain railroads in that State. The defendant railroad had entitled itself to 120 sections of land within the first twenty continuous miles of its railroad to be selected and located within 15 miles of the line of its road.

The suit was brought by the Tennessee and Coosa Rivers Railroad Co. against James Mathias and another for the purchase money due and unpaid on a contract of sale. The plaintiff's proofs consisted of :

The Act of Congress of June 3d, 1856, granting the lands.

The Act of the General Assembly of Alabama, approved January 20th, 1858, conferring upon the Tennessee and Coosa River Railroad Company so much of the lands as were granted for the purpose of aiding in

the construction of the Tennessee and Coosa River Railroad Company's railroad.

The selection and location of the 120 sections of the lands so granted of the State of Alabama by the said Act of Congress, the certification thereof by the Governor to the Secretary of the Interior, and the approval of the same by the Secretary on June 27th, 1860.

No proof was offered to show whether or not the lands in question were embraced within the first twenty continuous miles.

It was conceded that if the land in question was beyond the twenty-mile limit the railroad corporation could convey no title; while, on the other hand, if within the 20-mile limit, the defense attempted was worthless.

The Court held that the burden of proof rested on the purchaser of showing whether the land does or does not lie within the sections the corporation was authorized to sell.

Applying this principle to the present case, if the land sold by Adams and Schilling was not mineral, they had good title and power to sell. If it was mineral, they had no title. The suit is brought by the seller to recover the balance of the purchase money. Under the case last cited, the burden rests upon Reed and Henderson, the purchasers, of showing whether the land is or is not mineral. Reed and Henderson acquired the full title and right of possession under the deed actually made to them, and have had the peaceable and undisturbed enjoyment of the premises ever since.

The 26th Finding, at page 24 of the Record, is that after the conveyance Reed and Henderson, as landlords, let and demised the lands in question to Adams and Schilling, the defendants. The words at the conclusion of this finding on page 25, that the defendants never actually occupied any of the said land, can have no possible effect upon the rights of the parties, because the possession of a landlord who demises prop-

erty to a tenant is the precise equivalent of actual possession by the landlord. The mere question of occupation is without importance.

We also cite

Greenblatt vs. Herman, 144 N. Y., page 13.

This was an action brought by a purchaser for specific performance, praying also that if the seller could not perform he should be adjudged to repay the purchase money. The seller's title had been derived through the administrator of one Charles W. Nichols, whose title was conceded. The administrator's right to convey the property depended upon certain proceedings in the Surrogate's Court, and the objection to the title was that the record of the Surrogate's Court did not show that all the heirs of Charles W. Nichols had been made parties. The Court held that in the absence of proof showing the existence of omitted heirs the purchaser was bound to accept the title. The language at page 20 is as follows :

> "The title is not doubtful by reason of any fact shown or by reason of any inference from any such fact. It is a possibility merely that such heirs may exist. But the plaintiff has not seen fit to give any proof on the subject, and has left it to conjecture merely, and a suspicion or conjecture, without any facts to support it, does not raise a reasonable doubt as to the validity of a title good upon the record."

In the present case, Reed and Henderson based their right to recover the purchase money paid by them upon the suggestion that Adams and Schilling's lands may be mineral. They offer, however, no proof in support of this fact. Within the principle of the case last cited the mere conjecture that mineral may be discovered in the land is not sufficient to cast a doubt upon the title conveyed by Adams and Schilling.

We cite further on this point :

Butler vs. Miller, 15 B. Monroe, 617.
Hunt vs. Utter, 15 Ind., 318.
Beauford's Administrator vs. Guthrie, 14 Bush, 677.
Simpson vs. Hawkins, 1 Dana, 303.
Landt vs. Major, 31 Pac. Rep., 524, Col. Appeals.
Union Pacific Railway Co. vs. Barnes, 64 Fed. Rep., 80.
McNeill vs. Colkins, 50 Ill. Appeals, 17.
Peck vs. Houghtaling, 35 Mich., 127.

There is nothing inconsistent with the proposition made in this point in

Corinne Co. vs. Johnson, 156 U. S., 574.

Plaintiff in that case claimed title under the Union Pacific land grant. The action was ejectment. The burden was confessedly upon the plaintiff.

The Court held that the plaintiff could not recover unless he proved not only that the lands were within the grant but also that they were not within the exception.

In the case at bar the positions of the parties are reversed but the principle applicable to the right of recovery is the same.

Reed and Henderson claim to recover because the title of their grantor is bad.

But to prove the title bad it is necessary to prove that the land was within the excepted lands. Without this proof it is impossible to conclude that the plaintiff's title was bad.

In ejectment the basis of recovery is that plaintiff's title is good, and he is held to complete proof of the allegation.

In an action to rescind the basis of recovery is that the grantor's title is bad, and the party seeking to rescind should be held to the like complete proof.

In like manner there is nothing inconsistent with the proposition made in this point in

Maxwell Land Grant Co. vs. Dawson, 151 U. S., 586.

That was also an action of ejectment, and the decision of the Court, as stated on page 604, is as follows:

> "Where there is an exception in the general granting or enacting clause, the party relying upon such general clause must, in pleading, state the general clause, together with the exception, and must also show by the testimony that he is not within the exception."

The only conclusion to be drawn from this decision is that in an action of ejectment the burden would rest on Adams and Schilling to prove that the land to which they claim title was not within the exception, but it by no means follows that when the grantees of Adams and Schilling sue them to recover purchase money paid to their grantors that the same burden rests upon them. On the contrary the burden of proof that the land *was within the exception* and Adams and Schilling's title *was bad*, rests upon Reed and Henderson before they can ask for a judgment to recover the purchase money paid by them.

Ankeny vs. Clark, 148 U. S., 345.

In this case Ankeny was the seller and Clark the purchaser of certain lands. Ankeny's title was derived from the Northern Pacific Railway Co. The action was brought by Clark to recover the value of a quantity of wheat which had been delivered by Clark, the purchaser, to Ankeny, the seller, in payment for the land. Clark's right to recover depended on Ankeny's right to apply the wheat in satisfaction or payment for the land sold by him.

It appeared in the case, and was not disputed, that Ankeny had refused to give a warranty deed for all of

the property, and had only offered a quitclaim deed for the railroad land, as it was called, which formed part of the property sold (see p. 147). Clark refused to accept this deed, and gave formal notice that unless within five days from the date of the notice Ankeny should convey a perfect title to the whole of the land sold by him by a good and sufficient conveyance he (Clark) would abandon and surrender the possession of the land to Ankeny (see pp. 147 and 148).

The defective nature of the deed tendered and the refusal after notice to tender a proper deed is evidently sufficient ground upon which to rest the conclusion of the Court that Clark was entitled to recover the value of the wheat. The opinion in the case was written by Mr. Justice SHIRAS, but whether the affirmance of the Court rested upon the points chiefly discussed in the opinion or upon the conceded refusal of Ankeny to give a proper deed does not appear.

In the opinion the Court does discuss the question whether Ankeny's title as derived from the Northern Pacific Railway Company was good. The objection to the title, as it appears at page 356, is as follows :

It was conceded by stipulation that the railroad was completed in 1880, that the route of definite location had been filed, and the road had been duly accepted by the President of the United States ; that the Northern Pacific Railroad Co. had executed and delivered to one Peter Huff a warranty deed of the land in question, and that said Peter Huff, with his wife, executed and delivered to Ankeny a warranty deed thereof. The Court thereupon states the objection to the title as follows :

> " Upon this state of facts it was contended by the plaintiff Clark that there was nothing to show that the Northern Pacific Railroad Company had paid into the Treasury of the United States the cost of surveying, selecting and conveying the same as prescribed by the Act of July 15, 1870,

nor to show that any patent had been granted to the railroad company."

At page 358 the Court finds that under the stipulation as to proofs made in this action it did not appear that the railroad company had "complied with the necessary conditions as to payment of costs of survey." The objection to Ankeny's title is not put by the Court on the ground that no patent had been issued; in fact, the cases cited in the first point of this brief show that this Court has repeatedly held that the title passes by the grant irrespective of the patent (see particularly Deseret Salt Co. vs. Tarpey, 142 U. S., 241). But the objection to Ankeny's title is put by the Court on the ground of the company's failure to pay the costs of surveying, selecting and conveying the lands as prescribed by the Act of July 15, 1870 (see p. 357).

But the question presented as to the duty of the Northern Pacific Company to pay the survey fees is totally different to the question presented in this case as to the duty of the Union Pacific Co. arising out of the provisions in the granting act excepting mineral land from the grant.

The provision relating to survey fees is a general one referring to all granted lands. The language of the statute is as follows:

> "That before any land granted by this act shall be conveyed to any company or party entitled thereto * * * there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or party in interest as title shall be required by said company."
>
> 13 Statutes, 365.

In 1870, when making the appropriation for the survey of the lands within the limit of the grant to the Northern Pacific Railroad Co., Congress added this proviso:

> "That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or party in interest."
>
> 16 Statutes, 305.
>
> Northern Pacific Railroad Co. vs. Traill County, 115 U. S., pp. 607 and 608.

These provisions, it will be noticed, apply to every acre of land granted to the company.

Of all words known to our legal nomenclature to express a condition precedent, none is stronger or more apt than the word "before." Hence, the payment into the Treasury of the United States of the cost of surveying, selecting and conveying the land by the company or party interested was an absolute condition precedent to any conveyance by the United States or under its authority. The construction of these provisions was all that was involved in the case of Ankeny vs. Clark, 148 U. S., 345, and has no bearing whatever in the case at bar, where no such provision is involved.

It certainly does not follow that because a grantor may be required to prove the payment of survey fees, without which payment he has no power to convey, that a grantor whose general title to his lands is conceded, except as to mineral lands, is bound to assume the burden of showing that his lands are not mineral.

The payment of the survey fees is an act of the grantor. The duty prescribed by the statute applies to all the lands which he holds. There is no difficulty whatever in furnishing the proof. He holds the receipts in his own control and can establish in a moment without difficulty the fact of payment and thus establish his right to convey. The obligation to pay the survey fees is created by the act. The sit-

uation is the same as though Congress had by public act imposed a tax, say, of fifty cents per acre upon all the lands granted to the railroad company. The act itself would prove the incumbrance, and if the act further declared that the company should have no power to convey until the tax were paid it would clearly be the duty of the railroad company to show that the incumbrance had been discharged and the full right to make deed of the property acquired; but none of these considerations apply to the case of the exception of mineral lands.

In the case of the obligation to pay survey fees, the act itself proves that the lands in question were subject to the burden.

In the case of the excepted mineral lands, the lands in question cannot be assumed to be within the exception unless proved to be mineral.

We may add in disposing of this case that the Court does not hold, even as to the obligation to prove payment of survey fees, that the burden of proof rested upon the seller. The conclusion that the survey fees had not been paid is based by the Court upon the failure of the seller, Ankeny, to aver the fact of payment in his answer and upon the stipulation. We cannot, therefore, conclude what the Court would have so held had there been no stipulation and had the pleadings been properly framed.

There is nothing inconsistent with the proposition made in this point in

Barden vs. Northern Pacific Railroad Co., 154 U. S., 288.

This was also an action to recover the possession of land brought by the Northern Pacific Railroad Co. It was conceded that the lands were mineral, but it was alleged that at the time the public grant became effective no part of the land was *known* mineral land (see p. 292). The only question litigated in that case was whether the lands excepted by the exception contained in the

grant were limited to lands known to be mineral at the time of the grant or whether the exception extended to lands discovered to be mineral at any time subsequent. The Court held that lands discovered to be mineral at any time subsequent to the date of the grant were, nevertheless, excepted. In the opinion rendered in the case at bar the decision in the Barden case is largely relied upon to sustain the claim of Reed and Henderson. The Court says at page 50 of the record :

> "As to lands containing minerals, whether known or unknown, no title passed, and the failure of the Government to explore or issue patents, and the great lapse of time, have not ripened a defective title into an indefeasible one. This being true, until patent issues there would be uncertainty as to the character of one's title."

And at page 52 :

> "The Railroad's title then to this land is subject to be defeated. At most its title is a base or determinable fee. It may be continuous forever, or it may be determined at any moment prior to the issuance of patent upon discovery of mineral."

If this argument be sound it must follow that the land-grant railroads can convey no title whatever until after the issue of a patent.

It is an obvious misstatement to call the title a base fee or to say that it is necessarily uncertain or liable to be defeated. As to the vast majority of the lands granted, which are in fact agricultural, the railroads' title is confessedly perfect, certain and subject to no contingency whatever. If, therefore, the burden of proof rests upon Reed and Henderson to establish their allegation that Adams and Schilling were not seized, there is nothing in the Barden case to relieve

them from this burden. If to the rule extending the excepted lands which do not pass by the grant to lands discovered to be mineral at any time subsequent to the grant we should add the further rule that in all actions brought by grantees against grantors the grantee must prevail unless the grantor prove affirmatively that the lands are not mineral, we throw, as we have shown, a vast number of titles into confusion, uncertainty and litigation.

In support of the extent of this disaster we call the attention of this Court to the concluding language of the dissenting opinion of Judge BREWER in the Barden case, at page 349 :

> " To now overthrow that and establish a new rule not merely unsettles the question of title to the lands within this vast area, but it may produce complications which we do not now perceive in the rights of individuals and counties, and even of the States along the line of this road."

We think we are safe in asserting that if the present case be affirmed upon the proposition now under discussion, it will be the pioneer in a procession of many thousand cases in all of which grantees who are weary of their bargains will recover against their unfortunate grantors.

The reasonable solution of this whole difficulty is to hold the buyer to his bargain, unless he shows that his grantor's title has failed by proof that the lands are in fact mineral.

POINT III.

The difficulty discussed in Point II. cannot be overcome by limiting the right of the land grant railroads to convey lands after patent issued.

In point of fact a vast amount of these lands have been conveyed by land grant railroads in anticipation of the issue of a patent. These sales and conveyances have been made to an army of purchasers, many of whom have again conveyed; the lands have been settled, occupied and improved, and all this in reliance upon the numerous decisions of this Court holding that the public grants vested a title *in præsenti* at the time of the grant and without reference to the issue of patent. A declaration, therefore, that the railroads should not convey before the issue of patent would afford no relief to the vast army of grantees of the railroad and subsequent grantees. The question to be passed upon relates to the rights and obligations as between Adams and Schilling and Reed and Henderson, and a declaration relating only to the question of the duties of the Union Pacific Railway Company will not assist in the solution.

Moreover, it is manifest from the Act of July 1, 1862, that it never was intended to require these land grant railroads to wait until patents were issued before selling their lands. The grant of the lands is contained in Section 3 of the act. The close of this section is as follows:

> "And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other lands at a

price not exceeding $1.25 per acre to be paid to said company."

And it is manifest from the language quoted that it was the intention and design of Congress that the railroad should, immediately after the grant became effective, sell and dispose of the granted lands. The object was to encourage the settlement of the public domain and to extend to all those willing to purchase lands and settle there an immediate opportunity to acquire farms and residences throughout the far West.

It is now thirty-five years since the grant was made, and twenty-eight years since the railroad was completed. There still remains a vast area of these public lands as to which patents have not yet issued. The details of the location, surveys, determination of the character of the lands and the enormous volume of patents to be issued has made it impossible for the Department of the Interior to complete this work during this long lapse of time.

It must, therefore, be conceded that it would have been impracticable to require that no sale should be made by the railroad companies until after patents were issued. Such requirements would have defeated the very purposes of the grant. It would be contrary to the general understanding, and the uniform practice.

POINT IV.

The acts of March 3, 1887, and of March 2, 1896, and the concurrent resolution of June 10, 1896, confirmed as against the United States the right and title of bona fide purchasers of lands contained within the limits of railroad land grants, so that,

as against such bona fide purchasers, the United States, by the acts cited, expressly disclaims any rights whatever, and confirms absolutely the title of such bona fide purchasers.

It appears from the proofs in this case that the lands in question were purchased from the Union Pacific Railway Co. by William Van Dyke and John Selman,

See Finding XV., p. 21.

and by Adams and Schilling,

See Finding XVI., p. 22.

and that the lands so obtained were conveyed by Adams and Schilling to Reed and Henderson for the sum of $7,333.32.

See Findings I. and IV., pp. 18 and 19.

It, therefore, follows that Reed and Henderson are *bona fide* purchasers for value of all of the property in question.

The only ground upon which they base their right to rescind is that the title of Adams and Schilling is open to question, because the United States, in the event of the discovery of mineral, before patent issued, would have the right to challenge their title and to claim that the lands were excepted from the grant. But the Act of March 3, 1887, as the same has been construed by this Court, protects the title of Adams and Schilling as *bona fide* purchasers, even if the lands in question should prove to be mineral before the issue of the patent by the United States.

The right of Reed and Henderson to recover their purchase money rests upon the conjectural and extremely improbable future discovery of mineral. The Acts of 1887 and 1896 expressly confirm their title as against the United States.

The case now at bar is one in which no patent has issued, where the *locus in quo* is occupied as agricultural lands, and where no minerals are known to exist, and being in a valley where it is in the highest degree improbable that any minerals exist or will ever be discovered. If the lands are not mineral lands, it is admitted that they are within the grant, and that the title of the Union Pacific Railway Company thereto was perfect, and consequently the title of Reed and Henderson is perfect. Under the *Barden case*, if minerals should be discovered prior to the time when the patent issues, these lands would be excepted from the grant, and in that event the title of Reed and Henderson would fail if it had not been confirmed (as it has been) by Congress.

For the convenience of the Court we print as an appendix hereto the text of the Act of March 3, 1887.

The 5th section of the Act of March 3, 1887, is the one which deals with lands within the "place limits" of the grant which have never been patented or certified, and which are for any reason excepted from the grant. The text of Section 5 is as follows:

> "SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be ex-

cepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor:

"*Provided Further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

Even if it had been discovered prior to the bringing of this suit that the lands in question were "mineral" within the meaning of the grant, and therefore originally excepted from the grant, nevertheless section five just quoted confirms the title of Reed and Henderson, for it will be seen that this section in terms confirms the title in all such cases where the lands so sold by the company are "*for any reason excepted from the operation of the grant to the company*," requiring only of Reed and Henderson that they "make payment to the United States for said lands at the ordinary Government price of lands [that is, $1.25 an acre], and thereupon patents shall issue therefor to such *bona fide* purchaser, his heirs and assigns."

The act of March 3, 1897, is printed in full in *United States vs. Winona and Saint Peter Railroad Company*, 165 U. S., 463, 466–469, foot-note.

Sections 3, 4 and 5 of that act are commented on at large and construed in the case just cited. Sections 3 and 4 deal with cases where a patent has issued, and

are not therefore specially applicable (except in their general provisions and as throwing light on Section 5) to the case at the bar. But Section 5, quoted *supra*, is the one specially applicable to *unpatented* lands, and the following is what the Court says as to the meaning and purpose of this section:

> "Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant and coterminous with the constructed portions of its road, and it is there provided that where the lands so sold by the company 'are for any reason excepted from the operation of the grant to said company,' the purchaser may obtain title directly from the Government by paying to it the ordinary Government price of such lands. It is true the term used here is '*bona fide* purchaser,' but it is a *bona fide* purchaser from the company, and the description given of the lands, as not conveyed and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has, nevertheless, purchased in good faith from the railroad company.
>
> "We have been referred in the arguments of this and other cases to the debates in Congress, and to the reports of the committees of the two houses to whom the bills were referred as con-

firmatory of the conclusions we have reached, but it is unnecessary to consider any of the evidence derived from these sources, if, indeed, it is open to consideration, for the language of the two acts is clear, and fully discloses the intent of Congress. Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

Under the operation of this fifth section, even if the lands were mineral and known to be such, the title of Reed and Henderson is confirmed and protected on the sole condition of paying to the United States $1.25 an acre for the land. If they should sue the company on the covenants in its deed, that would be the full measure of their recovery. In this case a conveyance has been actually made by the company to Reed and Henderson, or to their grantors. They are in actual possession, through their tenants, cultivating and enjoying the land. Neither their title nor their possession has been disturbed or questioned either by the Government or by any one else. Who ever heard of an executed contract for the sale of lands amounting to several thousand dollars, under the circumstances of this case, being rescinded and annulled because of an insignificant incumbrance of a few hundred dollars, which in any event it is within the power of the grantee to pay and save his lands?

The Act of March 3, 1887, is a complete answer to the claim on the part of Reed and Henderson for a rescission, even if the contract were executory and no deed had ever been made. The rule in equity is that contracts are not to be rescinded except where the subject matter of the contract substantially fails, and where compensation cannot be awarded without doing injustice in respect of the part to which the title fails.

Bispham Eq., 4 Ed., p. 450, Sec. 389.

But when the case is considered in the light of the larger provisions of the Act of March 2, 1896, the equity of Reed and Henderson to a rescission stands completely negatived, since the express decision of this Court in the *Winona and Saint Peter Railroad case* is that the phrase *bona fide* purchaser, as used in the said Acts of 1887 and 1896, does not mean the same as the phrase *bona fide* purchasers, as such purchasers are defined by a court of equity, which requires the three elements of a valuable consideration, absence of notice, and presence of good faith; but, under said acts, only actual good faith in the purchaser is required.

Construing the said Acts of 1887 and 1896, this Court expressly held that they operated "to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

The effect of this legislation is to confirm the title to Reed and Henderson, even though we assume that, because of their mineral quality, the lands were

excepted from the operation of the grant. The general purpose of this legislation, as declared by this Court in a recent case—United States, appellant, against the Winona and St. Peter Railroad, 165 U. S., p. 463—was to effect an adjustment of the titles of *bona fide* purchasers of land-grant lands. The whole object of the act was to declare that, as far as the United States was concerned, it would not disturb the right and title of *bona fide* purchasers, but that all such titles are intended to be ratified and confirmed. In construing the Act of 1887, and the kindred Act of March 2, 1896, the Court says, at page 477:

> "We are of the opinion that Congress intended, by the sentence we have quoted from the Act of 1896, to confirm the title, which, in this case, passed by certification to the State, which not only declares that no patents to any lands held by a *bona fide* purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the Government to disturb it."

Concurrent Resolution of June 10, 1896, Considered.

If there could be any doubt, under the decision of this Court, in the *Winona and Saint Peter Railroad Company case*, that the Acts of 1887 and 1896 confirmed the title of Reed & Henderson, all such doubt is removed by the *concurrent resolution adopted by Congress June 10, 1896* (29 Stat. at L., App., p. 10), which is as follows:

> "UNION PACIFIC LAND GRANTS.—*Resolved, by the House of Representatives (the Senate concurring)*, That the Secretary of the Interior be, and

he hereby is, authorized and directed to resume work upon, and to issue patents to, the Union Pacific Railway Company, without delay, to all lands which have been sold by said company to *bona fide* purchasers; *Provided*, That nothing herein contained shall be construed as waiving any right that the United States may have to declare a forfeiture as to the lands which have not been so sold by said company; *Provided*, That the words '*bona fide* purchasers' herein contained shall not be held to include the holders of lands secured by mortgages on such land grant.

"Passed the House of Representatives June 6, 1896.

"Passed the Senate June 10, 1896."

In this resolution Congress dealt specifically with the Union Pacific land grant; and, although the company was, on June 10, 1896, in default in its obligations to the Government, and known to be so, yet so highly favored was the case of *bona fide* purchasers from the company, that Congress peremptorily directed the Secretary of the Interior to resume work upon, and to issue patents to, the Union Pacific Railway Company, without delay, to *all* lands which had been sold by said company to *bona fide* purchasers. Reed & Henderson, being such purchasers, are within the plain terms and provisions of this relief resolution. Under this resolution, even if the *locus in quo* were now known to be mineral, the title of Reed & Henderson would be confirmed; and note that it is *not made a condition of such confirmation that they shall pay anything to the United States*. Whatever remedy the United States would have for the recovery of the purchase price of the land, to wit, $1.25 an acre, would be against the company, and not against the purchaser; and, in this view, Reed & Henderson would have a full, absolute and indefeasible title as against the

United States, without the payment of any money whatsoever.

There is no claim that the title is imperfect in any respect, except as against the United States. The United States has stepped in, and not only waived its claim, but confirmed the title of the purchaser. The confirmation by Congress of the title is in law and legal effect a grant of the land, since a legislative act of confirmation operates not only as a conveyance, but also as a statute or a law enacted by proper authority declaring the force and effect of such conveyance, which is that the title of the confirmee is made effectual for all intents and purposes from the time of its inception.

Hoffnagle vs. Anderson, 7 Wheat., 212, and the previous cases in this Court there cited.

See, also,

Ryan vs. Carter, 93 U. S., 78, 82.
Langdeau vs. Hanes, 21 Wall., 521, 529.
Tripp vs. Spring, 5 Sawy., 209, 216, FIELD, J.

The confirmation is therefore retroactive, and operates on the present title even if it were originally defective. This confirmation by Act of Congress was as valid for the purpose of vesting and confirming the title of the purchaser as a specific release or conveyance would have been, since it is well settled that Congress may make a grant of lands directly by statute, just as well as indirectly through a patent issued by the officers of the Interior Department. If a specific grant or release had been made under authority of an Act of Congress, we could bring that grant or release into this Court, and, on the authority of the decisions above referred to, have the benefit thereof.

We, therefore, submit, that the reasons assigned in the decision appealed from for holding the title of Adams and Schilling to be bad, because of the possible future discovery of mineral wealth, are untenable.

POINT V.

The contention that the title of Adams and Schilling was encumbered by a reservation contained in the lease reserving to the railroad the right to enter upon the lands and prospect for coal and other minerals is untenable.

The reservation alleged to constitute an incumbrance is set forth in Finding XXII., page 24.

At folio 50, page 30, it appears that a quitclaim deed was executed by the Union Pacific Railroad Company to Adams and Schilling, remising and releasing and forever quitclaiming to them all the title of the railroad company to the land in question. The only ground upon which it is alleged that the reservation in question formed an incumbrance upon the property is that the language of the reservation is "The exclusive right to prospect for coal and other minerals," but a release of all the title of the railroad company would, of course, discharge such reservation in its entirety. The fact that the general words in the deed are followed by the words "All its interest and claim to any coal which may be hereafter found" does not in any manner limit the effect of the general words "All the title of the railroad company."

It may be added on this point that the universal current of authority holds that a breach of a covenant against incumbrances is no ground for a judgment rescinding a contract, but only ground for recovery of damages upon proof of their extent.

POINT VI.

Where the vendor in a sale of land executes a conveyance to a purchaser with warranty of title, as in this case, the deed becomes the only contract between the parties, and the vendor's previous representations as to the validity of his title, or the right of possession which it gives, are regarded as mere expressions of confidence in his title, and are merged in the warranty and covenants which determine the extent of his liability; and, unless there is positive or actual fraud, the contract will not be rescinded, but the grantee confined to the remedy which his covenants give him. Such is the established doctrine of our law, both in this court and elsewhere.

We have heretofore in this brief considered the case at bar as if there were an executory contract between the appellants and the respondents for the sale of this land; and we have shown that, even in such case, the contract, under the circumstances, could not be rescinded. We now propose to consider the case in its true light, namely, as one where the contract for the sale of the land has been executed by an actual conveyance with covenants.

Let us recapitulate the facts in this regard:

The land is within the terms of the grant to the railroad company unless it is "mineral." No minerals are known to exist. The United States have never refused to patent the lands because they were mineral, or because they were not embraced in the grant to the company. On the contrary, Congress by the concurrent resolution of June 10, 1896 (29 Stats. at L. App.,

p. 10), has specifically directed the Secretary of the Interior "to issue patents to the Union Pacific Railway Company without delay to *all* lands which have been sold by said company to *bona fide* purchasers."

The appellants were in possession at the date of the conveyance to the respondents, cultivating the lands as agricultural lands. The appellants conveyed with warranty. The respondents took possession, and shortly thereafter executed a lease of the lands to the appellants, and as such tenants the appellants were in possession up to and including the time of the trial. There is no proof or finding of actual fraud in the sale, and no proof of any fraud whatsoever. The only finding is that, at the time or a day or two before the purchase by the respondents, Mr. Adams stated that the appellants had a good title to the property, and that they would get an abstract for the respondents (Record, p. 18). There is no finding that Mr. Adams did not make this statement in good faith. There is no finding that it was made with intent to deceive or defraud. On the contrary, it is evident that this statement was made in good faith and with no intention to defraud. The appellants refused to sell a full interest in the land, and only sold two-thirds interest. The appellee Henderson so testified (Record, p. 34). On this state of facts we venture to say that it was never before heard of that a deed could be canceled and the sale rescinded.

In the cross-complaint the respondents set up a case of actual fraud and reliance upon the fraudulent representations of the appellants. It is alleged in the cross-complaint that on March 27, 1890, the plaintiffs represented to the defendants that the plaintiffs had a good title in fee simple to the land in question; that defendants believed the said representation, and relying thereon purchased said lands from plaintiffs, receiving the warranty deed, copy of which is set out in the plaintiffs' complaint; that the plaintiffs did not have such title; that plaintiffs' said representations "were false and fraudulent; and that the *plaintiffs did then and there*

know that such representations were false and fraudulent and untrue, and were made to deceive these defendants" (Record, p. 15).

In other words defendants relied on a plea of actual fraud and not on a defective title, except as such title, if defective, supported their averment that a representation of good title was untrue.

The Referee found that the representation as to title was made as alleged, and that it was in fact untrue (Finding 3, Record, p. 18), but failed to find any *scienter* or any fact inconsistent with the most perfect good faith in plaintiffs when they made the representation. And in Conclusion of Law No. 3, the Referee finds that such misrepresentation was "a *fraud in law* upon said defendants" (Record, p. 25); thus distinguishing between intentional fraud and one not intended; between moral turpitude and innocent misrepresentation.

The question then arises, is a contingent failure or contingent defect of title, coupled with an innocent misrepresentation as to such title, sufficient to authorize a court to rescind an executed contract, such as a warranty deed.

It is familiar law that:

> "Where a deed is executed in pursuance of a contract for the sale of land, all prior proposals and stipulations are merged, and the deed is deemed to express the final and entire contract between the parties."
>
> *Williams* vs. *Hathaway*, 19 Pick., 488.
> *Jones* vs. *Wood*, 16 Pa. St., 25.
> *Carter* vs. *Beck*, 40 Ala., 599.

In *Dart's Vendors and Purchasers*, Ch. 14, Sec. 5, the rule is thus laid down:

> "With some few special exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects either in the title to or quantity

or quality of the estate which are not conveyed by the vendor's covenants."

And in Sec. 6 he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of *actual fraud* on the part of the vendor or where the subject matter of the contract had no existence, and hence the contract void for failure of an implied condition.

See opinion of WILLIAMS, J., in *Joliffe* vs. *Baker*, L. R., 11 Q. B. Div., 267.

In the case just cited the court said:

"That so far as such conditions [statements as to title in written conditions of sale given to intending purchaser] form part of any contract, they are entirely merged in and superseded by the formal deed of conveyance."

Such is the doctrine of this Court.

Thus, FIELD, Justice, in delivering the opinion of the court in *Andrus* vs. *Smelting Co.*, 130 U. S., 643-648, said:

"Where the vendor, holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor, *executes a conveyance to the purchaser, with a warranty of title and a covenant for peaceable possession*, his previous representations as to the validity of his title, or the right of possession which it gives, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant which determine the extent of his liability."

This principle is so familiar that it has gone as undisputed law into the text books, and is thus stated in *Rawle on Covenants*:

"The distinction between the rules which govern the relation of vendor and purchaser before and after the execution of the deed—*while the contract is still* EXECUTORY, *and after it is* EXECUTED—is a broad and familiar one. Although the general principles of the contract of sale of real estate, both in this country and in England, exact less from the vendor than the rules of the civil law demand, yet, while the contract is still *executory*, they recognize and enforce the right of the purchaser to a title clear of defects and incumbrances, and this right, it has been often said, is one not depending for its origin upon the terms of the contract, but is given by the law; nor, except in particular cases, is it affected by the nature and extent of the covenants for title which the purchaser is to receive."

"*But when the deed of conveyance has been delivered, a different rule applies. The contract is then executed*, and any inconsistencies between its original terms and those of the deed are, in general, to be explained and governed solely by the latter, into which the former is merged, and by which the parties are thereafter to be bound, *and the purchaser's only right to relief*, EITHER AT LAW OR IN EQUITY, *from defects or incumbrances, depends, in the absence of fraud, solely upon the covenants for title which he has received.*"

Rawle on Covenants, 3d Ed., p. 611.
See, also, *Sugden on Vendors and Purchasers*, 684.
Dart on Vendors and Purchasers, 363.

That no misrepresentation, unless it be willful, furnishes an exception to the rule, is also well settled.

A case much in point is *Legge* vs. *Croker*, 1 Ball and Beatty, 506, in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly but that it had been legally stopped by a grand jury presentment forty years

before. It turned out that there was a footway, the presentment applying only to a carriageway, and the lessee was convicted for obstructing it, whereupon he filed his bill to be relieved from the lease; but Lord MANNERS dismissed his bill, saying:

> "If there were a willful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way it cannot be called a misrepresentation."

In *Wilde vs. Gibson*, 1 H. L. C., 605, it appeared that Lady Wilde sold certain building lands to Mr. Gibson, the lands were described as unaffected by any right of way over them. After the purchase was completed the vendee discovered that a public way passed through the property and that the vendor's mother—from whom she had inherited the land—had executed a deed to the authorities of the town acknowledging the right of way and covenanting to pay a nominal rent each year for the privilege of inclosing the portion of the land over which it ran, and to open it whenever required. This rent had been regularly paid down to the date of the sale.

Lady Wilde had no actual knowledge of the existence of this deed or of the payment of the rent. The town authorities required the old way to be opened and Gibson then filed his bill to set aside the conveyance to him and to recover the purchase money, and KNIGHT BRUCE, V. C., entirely acquitting Lady Wilde of personal fraud or deception in the matter, set aside the conveyance. Upon appeal to the House of Lords this decree was reversed.

Lord CAMPBELL said:

> "In the court below the distinction between a bill for carrying into execution an executory contract and a bill to set aside a conveyance that had been executed has not been distinctly borne in

> mind; with regard to the first, if there be misrepresentation or concealment which is material to the purchaser a court of equity will not compel him to complete the purchase; but where the conveyance has been executed * * * a court of equity will set aside the conveyance only on the ground of actual fraud; and there would be no safety for the transactions of mankind if, upon discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside."

In *Aliffe vs. Baker*, L. R. 11 Q. B. Div., 255, the vendor represented that a certain lot contained three acres, the vendee bought on the faith of this representation, paid the purchase money and received his deed. The vendor had himself bought the same lot as containing three acres and believed on some reason that his representation was true. On a survey it was ascertained that there were only about two and one-fourth acres in the lot, and the vendee sued for compensation for the deficiency, alleging the misrepresentation of his vendor, which he claimed to have been fraudulent. The plaintiff recovered judgment in the court below. On appeal it was strenuously urged in support of this judgment that the misrepresentation as to the quantity of land was a legal fraud even if there were no intended deceit. The judgment was reversed. WILLIAMS, J., after citing the opinion of Lord Bramwell, in *Weir* vs. *Bell*, L. R. 3 Ex. Div. 238 243, said:

> "Armed with this authority of Lord Bramwell, I reject the phrase 'legal fraud,' as distinguished from moral 'fraud and deceit,' as wholly inapplicable and inappropriate to legal discussion, and I simply ask the question in the present case, do the

facts disclose a case of fraud? and I replied unhesitatingly that they do not. Perhaps it is scarcely necessary to add that there can be no doubt that, if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact, and for his own benefit, regardless of whether the fact is so or not, then that is the strongest possible evidence of fraud in the plain meaning of the word. * * * Still, even in such a case as that, the fraudulent element must be found to exist *as a fact*, and cannot be adopted as a mere *inference of law*. * * * And see *Haycraft* vs. *Creasy*, 2 East, 92, where the defendant had said to the plaintiff that he knew as a fact of his own knowledge that he might trust a certain person to any amount, and it turned out that that person was in fact an impostor and without means, and that the defendant consequently could not in one sense have actually known what he said to be true; but that being himself duped he believed it. Lord Kenyon left the case to the jury as a case of fraud, not in the sense which affixes the stain of moral turpitude, but falling within the definition of *legal fraud*, and the jury under this direction found a verdict for the plaintiff; but this was afterwards set aside by the court, on the ground that it was essential that the jury should find that the defendant had acted in bad faith, and *malo animo* and *fraudulenter*."

A. L. Smith, J., said:

"I wish to add upon the point which was much argued at the bar on behalf of the respondent, viz.: as to what constitutes fraud, that in my judgment an action for damages for deceit cannot be maintained unless the plaintiff establishes that the de-

fendant has made a statement false in fact and fraudulent in intent. If a man makes a statement knowing it to be untrue with the intention that another should act upon it, that obviously is fraud; so also if a man recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which in my opinion is necessary to maintain an action for damages for deceit. If a man makes a statement which he believes to be true, but which is in fact untrue, even though made with the intention that another should act upon it, this in my judg ment will not suffice to maintain an action for damages for deceit. In the present case the necessary moral turpitude is wanting. It seems to me misleading to talk of legal fraud in such a case as distinguished from moral fraud, and I adopt what was said by Bramwell, L. J., upon the point in *Weir* vs. *Bell*."

The rule is the same in equity as at law after a conveyance. Nothing short of actual positive fraud as distinguished from legal fraud will justify a decree of rescission for misrepresentation.

Southern Development Co. vs. Silva, 125 U. S., 247.
Wilde vs. Gibson, 1 H. L. C., 632.
Joliffe vs. Baker, L. R., 11 Q. B. D., 272.
Brownlie vs. Campbell, L. R., 5 A. C., 937.
Key vs. Jennings, 66 Mo. 356.
Clark vs. Tennant, 5 Neb., 549.

It must follow then that, as the intent to defraud, or the knowledge by plaintiff of the falsity of the representation was not found as a fact, but on the contrary, was substantially negatived, the facts found do not support the decree. Respondents have their remedy on the covenants in their deed for any defect of title or

incumbrance, if there be any, but cannot ask of a court of equity to be relieved of their purchase.

The fact that by a mistake of the scrivener there was a mistake in the deed cannot alter the case. The mistake is admitted and is found by the court. No other mistake is alleged. The deed with the mistake corrected was the *entire contract* between the parties and none the less merged all prior proposals, representations not fraudulent, and stipulations between the parties. This contract was an executed contract and not one to furnish in the future a certain quality of title for a certain sum. In the latter case defendants need not have accepted any title which was not in accordance with the contract. But in the former there in an absolute acceptance of the title, precluding a subsequent rejection except for fraud; the grantee, for his protection and knowing that he cannot thereafter rescind because of a defect in the title, insists on covenants of warranty. The policy of the law requires that he should be remitted to his remedy on such covenants rather than after the lapse, perhaps, of much time, he should undertake to rescind the entire transaction because the vendor, believing he had title, said so and showed his faith by warranting it. Men are apt to be sanguine of their right and to believe in their own title, and it would be safe to say that hardly a sale takes place without the vendor asserting the unimpeachable nature of his right.

Notwithstanding the mistake the equitable title to the land intended to be conveyed was vested in the defendants.

2 Beach Eq. Jur., Sec., 542, p. 615.
Bush vs. Bush, 33 Kans., 556.
Crawford vs. Edwards, 33 Mich., 354.

But it is sufficient to say that defendants did not take a contract for the future conveyance of a title of any particular quality; but required for their protection covenants of warranty instead.

POINT VII.

The conclusion of law that the representations made by Adams and Schilling to Reed and Henderson concerning the title of said land were untrue and a fraud in law upon Reed and Henderson is untenable.

The finding of fact upon which the above-quoted finding of law is based is the third finding. It rests entirely upon the proposition contained in the fourth finding of law at the foot of page 25 that the title of the Union Pacific Railway Company to the land in controversy is not a good title, but is encumbered, and what title it has may be defeated at any time by the United States before the issuance of patent.

This fourth proposition of law rests entirely upon the assumption that the burden of proof as to the mineral character of the land was on the sellers, Adams and Schilling, and that they have failed or neglected to prove that the lands were not mineral, it therefore follows that their title is bad.

It is clear that if this assumption is not justified, and the Court should hold with these appellants, that the burden of proof rested upon Reed and Henderson, and no such proof having been made by them, we cannot conclude that as a matter of fact the plaintiff's title was bad.

Reed and Henderson ask to rescind and to recover judgment. They say Adams and Schilling represented to them that their title was good and that representation was untrue and fraudulent.

Until it has been affirmatively proved that the title in question was bad, the Court cannot assume that any fraudulent or untruthful representation was made.

> "Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made

out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. * * * Where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained."

Clark vs. Reeder, 158 U. S., 505-523.
Farrar vs. Churchill, 135 U. S., 609-615.

We assert to-day that the title of Adams and Schilling is absolutely good, free from all flaw, and that their purchasers have no cause of complaint whatever.

It seems to be a farce to characterize the statement made by Adams and Schilling that their title was good as a fraudulent statement entitling the purchaser to rescind. They certainly believed that their title was good. Their counsel, after patient investigation of years, still believes the title to be good. The record contains no proof from which this Court can conclude that the title was not good. If the lands are agricultural, the title is confessedly good; and is the mere possibility of the future discovery of mineral in any portion of the vast tracts covered by land grants to railroads to be considered such an infirmity that a statement by any one of these railroad companies that it has good title to land contracted to be sold is, *ipso facto*, to be treated as a fraudulent and untruthful statement which will entitle its grantee, or any subsequent grantee, to rescind as for fraud without further evidence than the production of the railroad company's deed? It is well-settled law that in actions to rescind for fraud or untruthful representation, or in actions to recover damages for fraud or misrepresentation, the accused must be found guilty either of misrepresentation, with knowledge that the fact represented is untrue, or else

he must be found guilty of representing that he had knowledge of the facts, when in point of fact he had no such knowledge.

Southern Development Co. vs. Silva, 125 U. S., 247.
Farnsworth vs. Duffner, 142 U. S., 43.
Wakeman vs. Dalley, 51 N. Y., 27.

It may be true that where a contract is wholly unexecuted an innocent mistake by one party will relieve the other party from the performance of the contract, but this principle does not apply where a contract has been executed in whole or in part.

In the present case the deeds for the property have been delivered. Reed and Henderson were put in possession; that is to say, that a lease from them by which they were recognized as landlords to Adams and Schilling, who thereby assumed the position of tenants, was executed and delivered. By these acts Adams and Schilling divested themselves of all ownership, and could not sell, or contract to sell, the lands to any one else. Reed and Henderson made their cash payments and delivered their obligations and mortgage to secure the same for the balance. In no just sense of the term can this contract be called an executory contract. In the opinion of the learned Court whose decision is appealed from authorities are cited to show that where an error has been made in a deed by mistake of the draughtsman equity will treat the erroneous deed as an executory contract and correct the mistake; but does it follow that because the deed in this case is to be treated as an executory contract to give a proper deed that the contract for sale, which has been fully carried out, is an executory contract?

The reason for the rule which has been so emphatically declared in courts of equity that contracts which have been executed will not be rescinded or set aside except for willful fraud, coupled with guilty knowledge on the part of the offender, is that where

the position of the parties has been essentially altered by delivery of title and possession on the one side and by payment of the consideration on the other, it is almost impossible to restore both parties to their former positions without doing injustice. If the case be one of willful fraud, the Court will rescind because it is just that the offending party be punished for his wrongful act; but, if the alleged misrepresentation be made without knowledge and without guilty intent, the Court declines to rescind and leaves the party claiming to have been injured to recover such damages or indemnity as he may prove himself to have suffered.

We refer on this point to the emphatic declaration made by this Court in

Atlantic Delaine Co. vs. James, 94 U. S., 207–214,

which was repeated with approval in

Union Railroad Co. vs. Dull, 124 U. S., 173, 183.

> "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

Applying the rule so clearly defined in the above words by this Court, can it be justly claimed that Adams and Schilling were guilty of fraud which has been made "clearly to appear" or of a false representation which has been "certainly proved." Their whole crime consists of the statement that their title was good, which they then believed, and now believe, to be true. The record is barren of proof that this statement was either willfully false or innocently untrue.

For the reason herein contained we submit that the judgment appealed from should be reversed and this suit remanded to the Supreme Court of the State of Utah for a new trial.

JOHN F. DILLON,
E. ELLERY ANDERSON,
P. L. WILLIAMS,
KIMBALL & KIMBALL,
Of Counsel.

APPENDIX.

Act of March 3, 1887.

An Act to provide for the adjustment of land grants made by Congress in aid of the construction of railroads and for the forfeiture of unearned lands and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the Secretary of the Interior be, and is hereby, authorized and directed to adjust, in accordance with the decision of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

SEC. 2. That if it shall appear upon the completion of such adjustments, respectively or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grants from the United States to aid in the construction of the railroads, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued to such lands, and to restore the title thereof to the United States.

SEC. 3. That if in the adjustment of said grants it shall appear that the homestead or pre-emption entry

of any *bona fide* settler has been erroneously canceled on account of any railroad grant, or the withdrawal of public lands from market, such settler upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public-land law: *Provided*, That he has not located another claim, or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated, within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any; and if there be no such purchasers, then to *bona fide* settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the Company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be

brought against such Company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor:

Provided Further, That this section shall not apply to lands settled upon subsequent to the first day of

December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the State and County taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue. Provided, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation or individual would be rightfully entitled.

Approved, March 3rd, 1887.

No. 70.

Brief of Richards for Appellees

Office Supreme Court
FILED
OCT 22 1897

Filed Oct. 22, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

LOUIS B. ADAMS and WATSON N. SHILLING,
Appellants,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A. Reed, deceased, and MILLIE G. REED.

BRIEF SUBMITTED ON BEHALF OF HENDERSON, Et. Al.

CHARLES C. RICHARDS and
JAMES H. MACMILLAN,
Attorneys for Henderson, et al.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

LOUIS B. ADAMS and WATSON N. SHILLING,
Appellants.

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of Edward A Reed, deceased, and MILLIE G. REED,
Respondents.

BRIEF OF HENDERSON, Et Al, RESPONDENTS.

STATEMENT OF CASE.

This is an action commenced by the appellants, Adams and Shilling in the Fourth Judicial District Court of the Territory of Utah, against Henderson and

Reed to correct the description of certain real estate in a mortgage bearing date of March 27th, 1890, and to foreclose the same for the sum of $4,888.88 together with interest, attorney's fees and costs.

The amended complaint states that on the 27th day of March, 1890, Adams and Shilling were the owners and entitled to the possession of the following described real estate, being in Weber county, Utah Territory, to-wit: An undivided two-thirds of the east one-half of section nine (9), township five (5), north of range two (2), west of the Salt Lake meridian; also an undivided two-thirds of the south one-half of the southwest quarter of said section; and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section

That on said day Adams and Shilling sold said real estate to Reed and Henderson for the sum of $7,333.34, and executed a warranty deed intending to convey said real estate to Reed & Henderson, but through a mistake of the scrivener who prepared said deed, the property was described as being in township (6) six instead of township five (5), and then and there delivered said deed to Reed and Henderson.

That on the 27th day of September, 1891, and as soon as Adams and Shilling discovered the mistake in said deed, they executed a so-called quit claim deed, describing the land as being in township five (5) instead of township six (6), which deed Adams and Shilling bring into court for the benefit and use of Reed and Henderson.

That at the time said first deed was delivered,

Reed and Henderson gave Adams and Shilling two notes for the sum of $2,444.44 each, secured by a mortgage upon the real estate described in the first deed; that there was a mistake in the description of the real estate in said mortgage, which read township (6) instead of township five (5); that said mistake was made by following the description of the land contained in the deed given by Adams and Shilling to Reed and Henderson.

As a second cause of action in the amended complaint, Adams and Shilling set out that the notes referred to in the first cause of action, together with the mortgage, and allege that there has been default made in the payment of said notes, together with interest, and in the prayer of the complaint ask that the mortgage may be reformed so as to conform with the land intended to be mortgaged, and that the same may be foreclosed. Record, pages 1–8.

The defendants in their answer deny specifically that Adams and Shilling were the owners or in possession or entitled to the possession of the property first described in their complaint; deny that they have ever been in possession of said real estate or any part of the same.

And the defendants allege affirmatively that thereafter and before the filing of the complaint in this action, the defendants, Reed and Henderson, ascertained and now allege that the plaintiffs were not the owners of and did not have a good and indefeasible estate in fee simple to the land as first described in plaintiff's complaint, and no title what-

soever in or to said land was conveyed to said Reed and Henderson.

That thereupon Reed and Henderson demanded back from said plaintiffs the amount of money paid by them to Adams and Shilling, and also the notes given for part of the purchase price.

And as a further defense defendants allege that the representations of Adams and Shilling in regard to the ownership of said land that they had a good and indefeasible estate in fee simple were false and fraudulent: that the plaintiffs did then and there know that such representations and allegations were false and fraudulent: that they did not have at that time or at any time or at all such a title as represented.

And defendants also filed a cross complaint which set out that the defendants, Reed and Henderson, bought the property first described in Adams and Shilling's complaint without seeing said land and without ascertaining the nature of the title: that Adams and Shilling represented to Reed and Henderson that they had a good title, and that the same was free and clear from all encumbrances, and then and there agreed to furnish Reed and Henderson an abstract of the title of said property.

That the defendants, Reed and Henderson, relying upon the representations of Adams and Shilling, and without seeing said land, and without looking upits title, bought an undivided two-thirds interest for $7,333.34, one-third of which was paid

in cash and the balance was evidenced by two notes for the sum of $2,444.44 each, secured by a mortgage. That as soon as the defendants, Reed and Henderson, ascertained that there had been a mistake made in the deed given by Adams and Shilling, and also that Adams and Shilling did not have a good and indefeasible estate in fee simple to the property intended to be conveyed by Adams and Shilling, Reed and Henderson rescinded said sale and demanded back from Adams and Shilling the amount of money paid, together with the notes and mortgage given by them to Adams and Shilling. No answer was filed to this cross complaint, but the following stipulation was entered into:

> "It is hereby stipulated between the parties to the above entitled action that all the allegations in the cross complaint of the defendants are hereby denied without filing an answer thereto; and it is further stipulated and agreed that the allegations in defendant's answer and cross complaint are sufficient to put in issue any defect or defects in plaintiff's title to part or all of the real estate described in plaintiff's amended complaint that may now or have heretofore existed against the same, and all proper evidence may be introduced by either the plaintiffs or defendants, either in support or derogation of said title, notwithstanding the defects to said title may not have been specifically pleaded in the answer and cross complaint."

Signed by the attorneys for plaintiffs and defendants.

The court can see by these pleadings that the issue was made direct concerning the ownership to the title of the property claimed by Adams and Shilling, and that the burden of proof was placed upon the plaintiffs to show that they had good title, and by looking at the record of the evidence as it was introduced, the plaintiffs and their counsel considered that the burden of proof was upon the plaintiffs, and the cause was tried upon this issue.

ARGUMENT.

POINT 1.

Adams and Shilling never did have a good indefeasible state in fee simple to the land in controversy, either at the time of the sale to Reed and Henderson, or at the time of the trial of this action.

It was admitted by counsel for plaintiffs and defendants at the trial of this action.

> "That the lands in controversy are and have been heretofore used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch mountains, and that no exploration or examination has ever been made of said lands for coal or minerals of any kind or description, and that there is no patent of record in Weber county, being the county in which the lands under controversy

are situated, for the east one-half of the southwest quarter of section 9, township 5, north of range 2, west of the Salt Lake meridian, and being the land in controversy; *and the conveyances and instruments introduced in evidence in this action by the plaintiffs, are the chain of title upon which plaintiffs base their title to the lands in controversy, and are the only chain of title of record in the County of Weber.*"

Record, page 40.

The court also found in finding 11 (page 20) that the lands are within the limit of the lands granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862; that the lands in controversy are and have been heretofore used and cultivated as agricultural lands, and lie in a valley at the base of the Wasatch mountains, and that no exploration or examination has ever been made on said lands for coal or minerals of any kind or description.

In this finding the court does not find that the lands are agricultural lands, nor that they are mineral lands. This finding simply leaves it in doubt to be hereafter determined whether the lands are mineral or non-mineral. No court could find as to the character of the land until that question could be passed upon and determined by the proper officers of the land office of the United States, and the only evidence of such determination is the patent.

Barden v. N. P. Railway Co., 154 U. S., 320.

Finding 18, page 22 shows that no patent was ever issued by the government for the land intended to be conveyed by Adams and Shilling to Reed and Henderson. The Court will also notice that Adams and Shilling did not introduce in evidence, and there was no stipulation to the fact that the survey charges had been paid by the Railroad company. Under this statement of facts we claim that the case of Ankeny v. Clark, found in 148 U. S. page 357, to be decisive of the case at bar.

In this case Ankeny sold to Clark or agreed to sell to Clark certain *agricultural* lands upon which no exploration or examination had been made for minerals, derived from the Northern Pacific Railway Company which lands were obtained by the Northern Pacific Railway Company from the government under a similar grant as the Union Pacific received the lands in controversy.

Clark paid the purchase price to Ankeny in wheat, and then demanded from Clark a warranty deed; Ankeny tendered to Clark a quit claim deed which Clark refused to accept and rescinded the sale and sued for the value of the wheat, which was the purchase price paid, and the court say in that case: "Under the ordinary system of pleadings an action of assumpsit would lie to recover back purchase money paid upon a contract of sale which has been rescinded." Page 352.

And the court further says on page 357: "In the case of Deseret Salt Co v. Tarpey, the court

per Mr. Justice Field regarded the failure or omission to pay the survey charges as operative to preserve to the government such control over the property granted as to enable it to enforce the payment of these costs and for that purpose to withhold its patent from the parties entitled to them until such payment and thus to give the government a lien for said costs."

"We, therefore, conclude that Ankeny the defendant below, if he held only a title derived from the Northern Pacific Railroad Company and if that company had not paid the costs of surveying and had not received a patent, did not hold such a title, as it was obligatory on the plaintiff to accept, and that the plaintiff below had a right to refuse the tender of defendant's deed, declare the contract off and maintain his action for the recovery of the purchase money."

> "But it is contended that the record does not disclose that the costs of survey and conveyance had not been paid and that it may be presumed that they had been paid and even that the lands had been actually patented to to the railroad company, in which event the question whether the costs of survey had been paid would be immaterial.
>
> "Turning to the pleadings and to the stipulation as to the facts we find that the defendant did not aver in his answer nor was it admitted in the stipulation that the railroad company had complied with the necessary con-

ditions as to the payment of costs of survey nor was it alleged or admitted that a patent had been issued to the railroad company for the lands in question. The plaintiff having alleged want of title in the defendant, and the latter having met that allegation when by the admission in the stipulation that the railroad company had filed its map of definite location and had constructed its road to the satisfaction of the President we think that the court below was warranted in holding that the defendant's title was imperfect and that there was no question of fact to submit to the jury."

In the case at bar Henderson and Reed in their cross complaint alleged want of title to the land in controversy, in Adams and Shilling and there was no stipulation or evidence that the survey charges had been paid or that the Union Pacific Railroad Company had ever filed its map of definite location, but to the contrary the evidence and the findings of fact show that no patent has ever been issued for this land.

Again in support of the above doctrine we have the case of Reaser v. Carney, 54 Northwestern 89.

The case of Tarpey v. Salt Company 142 U.S., page 241, is not in point for the reason that that was a case of ejectment and the court held, without determining the absolute nature of the title that the Railroad had in the lands granted to it by the government, that the railroad and its grantees

did have sufficient title on which an action of ejectment could be maintained. This view is not controverted.

The number of estates in land less than a title in fee simple on which an action for ejectment, trespass, etc., can be maintained, we do not consider necessary at this time to invite the attention of the court. This doctrine is primary and needs no citation of authorities.

The Supreme Court of the United States in the case of Barden vs. The Northern Pacific Ry. Co., 154 U. S., page 312, explains many of the decisions heretofore rendered by that court and lays down the latest rule, and explains what title railroad companies receive to lands under the various grants of Congress.

On page 315 of the opinion the court say: "Such is the purport and sole purport of the cases of St. Paul and Pacific R. R. Co. vs. Northern Pacific Co., 139 U. S. 1 and 5, and Deseret Salt Co. vs. Tarpy, 142 U. S., 241, 247," cited by the plaintiff.

> "In both of those cases the writer of this opinion had the honor to write the opinions of the court, and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect within certain designated exceptions as the date of the grant. They never decided anything else: and what was that title? It was of the lands

which at the time of the grant were not reserved as mineral, and of lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached." On page 316 the opinion continues: "It seems to us as plain as language can make it, that the intention of Congress was to exclude from the grant actual mineral lands, *whether known or unknown*, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things, that of definitely fixing the line of its road, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not sold, reserved, granted, or otherwise appropriated, and were free from pre-emption or other claims or rights at the time the line of the road was definitely fixed, and was coupled with a condition that all mineral lands were excluded from its operation. * * * It is difficult to perceive the principle upon which the term 'known' is sought to be inserted in the act of Congress, either to limit the extent of its grant or the extent of its mineral, thoughts purpose is apparent."

On page 318 of the same opinion "when the act was passed making the grant to plain-

tiff, it would have been impossible to state with any accuracy what parts of the tract contained minerals and what did not. *That fact could only be ascertained after extensive and careful exploration.* On page 320 "some weight is sought to be given by counsel for the plaintiffs to the allegation that the lands in controversy are included in a section which was surveyed in 1869, and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined and reported to be agricultural and not mineral; but conclusive answer to such alleged determination and report is that the matters to which they related were not left to the surveyor general. * * * * The determination of the character of the land granted by Congress in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the land department, whose action is subject to the revision of the Commissioner of the General Land Office and on appeal from him by the Secretary of the Interior. Under their direction and supervision the actual character of the land may be determined and fully established * * * Moreover, I am informed by the officers in charge of the Mineral Land Department that ever since the year 1867 it has been the uniform practice to allow and maintain mineral locations within the jurisdictional limits of railroad grants,

based upon discoveries made at any time before patent. This principle having been uniformly followed and generally accepted for so long a time there should be in my judgment the clearest evidence of error as well as the strongest reasons of policy and justice controlling before departure from it should be sanctioned. It has, in fact, become a rule of property."

It will be seen from the last case above quoted that in all railroad grants of land where patent has not issued the same is subject at any time to be taken from the railroad; that while the grant in itself may be a grant in presenti, yet until patent issues the title of the railroad is not fixed and is not a title in fee simple.

The argument made by counsel for the appellants, how many hundreds of thousands of titles would be disturbed if the court should follow its former decisions in the case of Barden v. Northern Pacific Railway Company, does not seem to be well taken. It would appear to be the wail of the U. P. Railway Company rather than of Adams and Shilling.

POINT 2.

In answer to the second point raised by appellants, to-wit:

"In an action to rescind a contract relating to the sale of real estate based upon the allegations that

the seller has not such title as he contracted to convey, the burden of proof is on the parties seeking to rescind."

The court will notice that the cross complaint filed by Reed and Henderson is simply an action of assumption to recover back money paid on a rescinded contract, and the court will further notice that this cross complaint was tried in conjunction with Adams and Shilling's complaint to correct and to foreclose their mortgage, and that Adams and Shilling, by their attorneys, assumed the burden of proof of establishing the nature of their title. And what was that title? Was it a title in fee simple or was it a base and determinable fee? Taking into consideration that no patent had been issued for this land, that Adams and Shilling did not prove the government survey charges had been paid, and also taking into consideration that the Union Pacific Railway Company reserved the right at any time to enter upon said land to prospect and mine for minerals; also taking into consideration that the trust company who held the mortgage upon this land had never released the same upon this reservation, no other conclusion can be arrived at, that the title was less than a title in fee simple which the appellants, Adams and Shilling, had contracted to convey to Reed and Henderson.

On page 40 of the record, folio 63, the court will find the following stipulation:

> ". . * * * And the conveyances and instruments introduced in evidence in this action by the plaintiffs are the chain of title upon which plaintiffs base their title to the lands in controversy, and are

the only chain of title of record in the county of Weber."

And on pages 29 and 30 of the record will be seen what those instruments and conveyances were, to-wit:

"It is admitted that the land lies in section nine (9), township five (5), north of range (2), west of the Salt Lake meridian, and is part of the land granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862.

Mr. Kimball: I will offer in evidence the mortgage dated April 16th, 1867, and recorded November 23rd, 1871, in Book "A" of mortgages of Weber county, at page 176, from the Union Pacific Railroad Company to Cyrus H McCormick and John Duff, as trustees on all of the lands granted by act of Congress approved July 1st, 1862, and the act amendatory thereto, approved July 2d, 1864. The trustees are authorized to release the lien created hereby upon any particular parcel of land upon payment of the purchase price thereof, and in case a vacancy shall happen in the board of trustees the remaining trustee shall, while such vacancy exists, have all the rights, exercise all the powers, and discharge all the duties devolving on said trustee.

Then I offer in evidence an instrument called an "appointment," dated October 20th, 1873, recorded February 12th, 1874, in Book I of Deeds, page 186, from Jno. Duff to Frederick L. Ames, appointing Frederick L. Ames trustee in place of Cyrus H. McCormick, resigned.

I now offer in evidence a mortgage dated December 18th, 1873, recorded February 12th, 1874, in Book

"A" of mortgages, page 48, from the Union Pacific Railroad Company to the Union Trust Company of New York.

I now offer in evidence a warranty deed dated December 11th, 1883, recorded February 4th, 1885, in Book "R" of Deeds, page 601, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to William Van Dyke, of the northwest quarter of the northeast quarter of section nine, (9), township five (5) north of range (2) [illegible]st of the Salt Lake meridian

I now offer in evidence a certificate dated September 28th, 1885, and recorded January 13th, 1886, in book "T", page 225, from the Union Pacific Railroad Company, by its president and secretary, to whom it may concern, confirming and validating all of the deeds which had been signed by the vice-president of the company.

I now offer in evidence a warranty deed dated April 28th, 1887, recorded September 27th, 1887, in Book "V," page 228, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to John Selman, conveying the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian.

I will now offer in evidence a warranty deed dated January 22d, 1886, recorded January 22d, 1886, in Book "S," page 614, from William Van Dyke to Louis B. Adams and Watson N. Shilling, conveying the northwest quarter of the northeast quarter of section nine, township five north of range two west.

I now offer in evidence a warranty deed dated September 27th, 1887, recorded October 1st, 1887, in Book "W," page 130, from John Selman to Louis B. Adams and Watson N. Shilling, conveying the northeast quarter of section nine, township five north of range two west.

I now offer in evidence a warranty deed dated October 18th, 1889, recorded July 5th, 1890, in Book "I," page 413, from the Union Pacific Railroad Company and the Union Trust Company, to Adams and Shilling, conveying the south half of the northeast quarter, the east half of the southwest quarter and the southeast quarter of section nine, township five north range of two west.

I now offer a warranty deed dated January 4th, 1888, and recorded May 1st, 1891, from the Union Pacific Railroad Company and Frederick L. Ames, trustee, to Louis B. Adams and Watson N. Shilling, conveying the southwest quarter of southwest quarter of section nine, township five north range of two west.

I now offer in evidence an instrument, "appointment of trustee," dated July 2nd, 1889, recorded October 19th, 1889, in Book "N," page 441, Frederick L. Ames to the Union Pacific Trust Company of New York.

Also an instrument entitled "conveyance", dated July 13th, 1889, recorded October 19th, 1886, from Frederick L. Ames to the Union Trust Company of New York.

Also an instrument dated July 15th, 1889, and re-

corded October 19th, 1889, called "resignation," from Frederick L. Ames to whom it may concern.

Also an instrument called "conveyance and quitclaim," dated January 15th, 1890, and recorded June 19th. 1890, from Frederick L. Ames to the Union Trust Company of New York.

I offer in evidence a quitclaim deed, No. 128, from the Union Pacific Railroad Company to Louis B. Adams and Watson N. Shilling, dated November 2nd, 1891, remising and releasing and forever quitclaiming to said Adams and Shilling all the title of the railroad company, all its interests and claim to any coal which may be hereafter found beneath the surface of the south half of the northeast quarter and the east half of the southwest quarter and the southwest quarter of section nine, in township five north of range two west of the Salt Lake meridian.

It is agreed that any and all of these conveyances may be copied and made a part of the record of this case by any party to this action; and it is also further agreed that the foregoing conveyances are introduced in evidence subject to all legal objections and exceptions that the parties defendant may take thereto in the argument of this case."

Counsel for the appellants seem to insist that the nature of our cross complaint is an action of ejectment when, in truth and in fact, it is only an action of assumsit to recover back the purchase price paid on a rescinded contract.

In answer to this point we again refer to the case of Ankeny v. Clark, supra.

POINT 3.

Under this head we will discuss points three and four of appellant's brief.

Point three seems to be an appeal to this court by Adams and Shilling through their railroad attorneys for one hundred thousand purchasers of land from railroad companies When this court decided the case of Arkeny v Clark, supra, it did not take into consideration this vast army of purchasers of railroad grants. And again we refer this court to the case of Ankeny v. Clark, supra.

The acts of March 3rd, 1887, and of March 2nd, 1896, and the concurrent resolution of June 10th, 1896, has nothing whatever to do with this action.

The acts of 1896 certainly would have nothing to do with this action for judgment was entered in the summer of 1894, and counsel for appellants will not claim that the act was retroactive so as to overturn a judgment already entered by a court of competent jurisdiction.

If Adams and Shilling believe the act of 1887 made them bona fide purchasers and made the title of the land in controversy a good title, let them attorn to the United States and perfect their title.

If there is any merit raised by point 4 in appellant's brief, it goes to show that the property in controversy never did belong to the Union Pacific Railway Company, and is still in the United States, and that it is necessary in order to get a good title to enter it in the proper land office of the United States.

POINT 4.

The fifth point made by appellants that the Union Pacific Railroad Company released all its rights to enter upon the land in controversy is not sustained by the evidence.

Finding 22. (record page 24), the lower court found as follows:

> 'That at the time, to-wit. September 29th, 1891, Adams and Shilling tendered the deed for the land described as follows: 'The northeast quarter. the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section nine, in township five, north of range two, west, of the Salt Lake meridian, United States survey,' to Reed and Henderson on the title to the land was so incumbered by reservation in the Union Pacific Railway Company dead of date October 8th, 1889, to Adams and Shilling, which reads as follows: 'Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land, and to mine for and remove the same, if found, and for this purpose it shall have the right of way over and across said lands and space necessary for the conduct of said business thereon without charge or liability or damage therefor.'"

Finding 23 is as follows:

> "That the Union Pacific Railroad Company executed and delivered to the plaintiffs a quit claim

deed, dated November 2d, 1891, and acknowledged on the 17th day of November, 1891, and duly recorded on the 8th day of January, 1892, releasing the land intended to be conveyed from the claim of the said company on coal, under the coal reservation in the deed specified in finding 22."

The conclusion of law on page 26 is as follows:

That the quit claim deed of November, 1891, from the Union Pacific Railway Company to Adams and Shilling did not release the rights of the company to enter upon the land and explore for minerals other than coal.

The evidence, (record page 30, folio 20) offered by appellants to substantiate this conclusion of law is as follows:

> Mr. Kimball: "I offer in evidence a quit claim deed No. 128 of the Union Pacific Railroad Company to Louis B Adams and Watson N Shilling, dated November 2nd, 1891, remising and releasing and forever quitclaiming to said Adams and Shilling al: the title of the Railroad Company all its interests and to ANY COAL which may be hereafter found beneath the surface of the south half of the northeast quarter and the east half of the southwest quarter and the southwest quarter of section nine in township five north of range two west of the Salt Lake meridian."

So that the Court can readily see that the Union Pacific Railroad Company never did release its right

to enter upon the land at any time to prospect for minerals other than coal, and even this release is not good as far as coal is concerned, for the Union Trust Company, who had a mortgage upon the reservation never executed a release of its mortgage; so that outside of the patent from the United States the Union Trust Company of New York and the Union Pacific Railway Company still have a lien upon and easement in the land in controversy.

POINT 5.

The deed given by Adams and Shilling on the 27th day of March, 1890, to Reed and Henderson was an executory contract for the reason that it did not contain the right description of the property.

On this point we will quote from the opinion of the Supreme Court of the Territory of Utah that rendered the decision from which this appeal is taken.

Record page 54.

"Is the transaction between the parties to this suit an executed or executory contract? A contract is executory when the thing agreed has not been done. It is executed when the thing has been done. * * * * * One who has begun to do what he promised but has not finished, has executed his undertaking in part.

Bishop on Con., sec. 624.

"Conceding that plaintiff's had a fee simple title to the land intended to be conveyed, the deed contained

a description of wholly different land. The land which defendants agreed to purchase was not conveyed They contracted for a warranty deed to a certain tract of land. The contract was not fully performed by plaintiffs. It was executory. The writing or deed amounted only to a contract to convey the land which plaintiffs claimed to own, and in equity would be enforceable, and, if the evidence was sufficient, would warrant a decree of specific performance. It was a contract executory, conveying a chose in action, not a contract executed, conveying a chose in possession.

2 Blackstone Com., page 443.
McDonald v. Hewitt, 15 Johns. Ch., 340.

"No right *in rem* was created; the only rights existing were *in personam*. If the contract between the parties had been executed, they would no longer have been bound by a contractural tie; rights would have been acquired in property which would have extinguished the contract. But we find plaintiff's asking for reformation of the contract, showing that it was incomplete, executory; that the rights were *in personam*. They were seeking to enforce a chose in action.

"An executory contract is one in which a party binds himself to do or not to do a particular thing."

Fletcher v. Peck, 6 *Cranch*, 137.

"Plaintiff's warranty deed was a contract, in which they bound themselves to convey the land defendants agreed to purchase, but parol evidence would be required to establish the correct description. It was a

defective deed, containing land which neither of the parties understood was conveyed or agreed to convey; it was therefore only a contract to convey, and was executory. A defective deed is an executory contract, and "it is a familiar rule that a defective deed may be treated in equity as an agreement to convey and perform were enforced, and where it is we think * * that it stands on the same footing as an executory contract to convey."

Hanson v. Nicholsen, 19 *Wis.*, 535.
Petesch v. Hambach, et al., 48 *Wis.*, 447.
Eaton v. Eaton, 15 *Wis.*, 284.
Mastin v. Halley, 61 *Mo.*, 200.
Fitch v. Gosser, 54 *Mo*, 274.

"In the case of Hunt v. Adams, of Rousmaniere, 1 Peters, 13 the court say: "There are certain principles of equity applicable to this question which as general principles we hold to be incontrovertible. The first is, that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, in writing or by parol, previously entered into, but which by mistake of the draughtsman, either as to equity or law, does not fulfill or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction, and if the instrument which intended to execute the agreement be for any cause insufficient for that purpose,

the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement."

"And in the case of Walden v. Skinner, 101 U S., 585, this language is adopted and the principle reaffirmed.

"In the case of Conrad v. Schwamb, 10 N. W. Rep., 396, plaintiffs brought an action to recover a tract of land. A deed had been executed to defendant, the grantors intending to convey certain land in fee, but by mistake it was described as being in a different quarter section. The court say: "The deed * * * although it did not convey the land intended, must be treated in equity as an executory contract * * to convey such land. * * Hence * * Schwamb might have maintained an action against Felton. * * to compel Felton specifically to perform his executory contract to convey the land claimed, so as far as he could perform it."

"And the quitclaim deed correctly describing the land tendered to defendants after the discovery of the mistake in the first deed did not answer the contract and fully execute it. Besides, the defendants had, a few days prior thereto, elected to rescind the contract, and had demanded back the amount paid and the surrender of the notes held by plaintiffs.

"From the foregoing authorities we are of the opinion that the facts in this case do not constitute an executed contract; the transaction between the parties, we think, evidences an executory contract, and that equity has power to decree a rescission

"We are not determining what *mala praxis* is sufficient to entitle one to rescind an executed con-contract, for, as stated, the transaction in this case shows an executory contract, and we believe the rule to be well settled that material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertance, when relied on and become the foundation of the active relations between the parties, operate as a "surprise and imposition" and constitute such fraud as will move a court of equity to decree a rescission of an executory contract."

1 *Story Eq.*, *sec.* 193
1 *Beach Eq. Juris*, *secs.* 69, 93.
Bishop on Con., *sec.* 662.
Clark on Con., *p.* 339.
2 *Pom. Eq. Juris.*, *secs.* 883, 887, 888.
Dorry v. Peck. L. R, 14 *App. Cas.*, 3337.
Arkwright v. Newbold, L. R., 17 *Ch. Div.*, 320.
Traell v. Baring, 4 *D. C., J. & S.*, 318.
Ship v. Criskell, L. R, 10 *Eq.*, 73.
Cooley on Torts. (2*ed.*) *p.* 582.
Hexter v. Bast, 125 *Pa. St*, 52.
Chatham Furnace Co., v. Moffat, 147 *Mass.*, 483.
Wells v. McGrooch, 71 *Wis.*, 196.
Defrees v. Garr, 33 *Pac. Rep.*, 217.
Gotzhausen v. Simon, 47 *Wis.*, 106.
Grant v. Law, 29 *Wis.*, 99.
Knowlton v. Amy, 47 *Mich.*, 204
Bullitt v. Farrar, 6 *L. R Ann.*, 149.

Litchfield v. Hutchinson, 117 *Mass.*, 195
Smith v Richards, 13 *Pet.*, 26.
2 *Wnr. on Vend*, *sec.* 18.

"As a rule, all representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for recission even though they may have been made without fraudulent intent"

3 *War on Vend*, *sec* 18.
Allen v. Hort, 72 *Ill*, 104.
Bennett v. Judson, 21 *N. Y.*, 238.
Mulvey v King, 39 *Ohio St.*, 491.
Wilcox v. Wes. Uni., 32 *Ia.*, 369.
Alvarez v. Bronnan, 7 *Cal.*, 503

"The facts in this case show that the representations of plaintiffs as to the character of their title to the land were more than mere expressions of opinion. They were affirmations of a material fact and inducements to the contract. Being untrue and material, they are fraudulent.

Cressler v. Rees, 27 *Neb.*, 515.
Conlan v. Roemer, 52 *N. J. L.*, 53"

POINT 6.

The representations made by Adams and Shilling were untrue and fraudulent and a sufficient recission was made by Reed and Henderson.

In discussing this last point it will necessarily involve the discussion of the last two points raised by appellants.

In Finding III the court expressly finds that the representations made by Adams and Shilling to Reed and Henderson concerning the title to said land were untrue, and also by Finding XXVI that Reed and Henderson had never been in possession of said land. These Findings are fully sustained by the evidence of H. H. Henderson, which is uncontradicted.

See Record pp. 34, 37, 40.

In this case the fraudulent representations of the vendors to the vendees, that they had a good title to the land have not been controverted and therefore must be taken as true.

Henderson testified that the vendors in this action informed him that they had a good title to the premises and that he relied upon that statement, and that he would not have bought the premises had he known that the title was in the condition which it was in, viz: that no patent had issued from the United States to the Union Pacific Company; that there was a bonafide lien existing in favor of the United States in the reservation of the grant, reserving the minerals from the conveyance.

The case of Carpenter vs. Wright reported in the 34 Pac. Rep. page 798, is decisive on this question. In that case it is said: "In her petition she alleged that the defendants represented to her that the company was the sole absolute owner of a certain lot, and that it was held free and clear of incumbrances, that the representations were made to induce her to purchase the premises, and relying upon them, she did purchase the lot and pay to the defendants therefor, the sum of $350. At the time of the purchase and payment there was a mortgage incum-

brance upon the lot of $11.013, in favor of John Westfall, which mortgage was duly filed for record, in the office of the registrar of deeds of Sedgwick County." * * * In the trial of the case, "the following special questions and answers were returned with the verdict: 'What representations were made by the defendent J. T. Carpenter to the plaintiff concerning the title to the property described in the deed attached to the plaintiff's petition?

A. The title was good.

Q. On what, if anything, did the plainfiff rely in purchasing the property described in the deed attached to the plaintiff's petition?

A. Representations of defendant Carpenter.'

Other answers disclosed that the Westfall mortgage was placed on file prior to the transaction complained of on May 6th. 1887, and that the plaintiff had no knowledge of the mortgage, except constructive notice by the record, until June, 1888, and, further, that the money paid by plaintiff when the lot was represented by the defendant company. * * *

"The contention that no recovery can be had because the incumbrance was a matter of record, is not sound. A fraudulent representation, by one who assumes to have personal knowledge, to the purchaser of real estate, that there is no incumbrance thereon, and upon which representations the purchaser relies and acts to his injury, will sustain an action for the tort, although the purchaser might have discovered the fraud by searching the records

McKee v. Eaton, 26 *Kan.* 226.

Curtis v. Stitson, 38 *Kan.* 302; 16 *Pac. Rep* 678.

Matleck v. Shafer, 51 *Kas.* ——: 32 *Pac. Rep.* 891.

David vs. Park, *103 Mass. 501.*

Babcock vs. Case, *61 Pa. St., Rep 427.*

Allen vs. Green, *5 McCrary*, *380; 17 Fed. Rep. 407.*

And in Allen vs. Hammond, 11 Peters, page 72., the court says: "The law on this subject is clearly stated in the case of Hitchcock vs. Biddings (Daniel's Reports 1) where it is said that a vendor is bound to know that he actually has that which he professes to sell."

And Warvell on Vendors, Vol. 2, p. 858, says: "False representations by the vendor as to nature, quantity or quality of the property, or of the title by which it is held, will entitle the vendee to a rescission of the contract."

And the same author says at page 945, Id. "In some instances it has been held that a defect or incumbrance not known to the vendee, when he accepts the deed, is a defence to a bond for purchase money although there be a general warranty."

Peck vs. Jones, *70 Pa. St., 83.*

In the case of McKee vs. Eaton, 26 Kas. 230, the court says: "The objections presented to the petition in the briefs are. * * *

2 It seeks to avoid and rescind an *executed* written contract upon the ground of fraud without alleging the facts which constitute the fraud but merely the conclusions

the plaintiffs draw from the transaction, and chose to denominate fraudulent.

"3. It seeks to avoid and rescind the contract without returning, or offering to return, that which the petition upon its face shows the plaintiffs received in the transaction

"4. It seeks to avoid and rescind the contract and at the same time to sue and recover damages claimed to have been sustained by reason of the transaction. * *

"It also appears that these representations were not only false, but known by the defendants to be so, and that Frank McKee, one of the plaintiffs, was induced by these false representations, to buy the said rights under the said letters patent, and to convey valuable property to the defendants therefor. * * *

"Counsel for defendants in this action contend that as the patent office of the United States is as accessible to one person as another, and as information concerning bonds can be obtained by one person as well as another, the representations of defendants in regard to the exclusive right to the patent, * * *
are simply matters of conclusion and opinion, and although untrue, do not vitiate the contract, or render the parties liable for false representations. * *
'A distinct statement of such a fact by a seller, knowing it to be false, and with intent to deceive the buyer, and on which the buyer acts to his own injury, even if the buyer might have discovered the fraud by searching the records of the patent office.'

David v. Park, 103 Mass., 501.
Claggett v. Crall, 12 Kas., 393.

"Before the plaintiffs' commenced action they offered to return the deeds for the so-called patent rights to the defendants; therefore, they offered to return all they received in the transaction. it is doubtful, however under the allegations in the petition, whether any return was necessary. The alleged patent is alleged to have been utterly worthless, because of the prior patent covering the same specifications and the same inventions."

And so it is in this case. The deed given was perfectly worthless as the parties giving it, had no right, title or interest, of, in or to it, and, therefore, it was not necessary to ever return it, it having conveyed nothing.

In Curtis v. Stitson et al, 38 Kan. Rep. 303. the court says: "Whoever positively and generally makes a false assertion, as an inducement for another to contract with him, and succeeds on that ground is guilty of fraud that vacates the contract. It must be as represented, or it is fraudulent."

Weckham v. Grant, 28 Kas. 517.

"A distinct statement of a fact by a seller, knowing it to be false, and with an intent to deceive the buyer, and on which the buyer acts to his own injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records."

David v. Parker, 103 *Mass.*, 501.

"The falsity and fraud consists in representing that he knows the facts to be true, and this renders him liable to a party who relies and acts upon the statements as true."

Litchfield v. Hutchinson, 117 Mass. 195.
Linn v. Green, 17 Fed. Rep. 207.

And in Wilcox v. The Iowa Wesleyan University, reported in the 32 Iowa at page 367, the court says: "That equity will grant relief on the ground of fraud, although the party representing the material fact made the assertion, not knowing whether it was true or not. The consequences to the person who acted on the faith of the representations are the same whether he who made them, knew them to be false or was ignorant whether they were true or not. And if the representations were made to influence the conduct of another party in a matter of business, and they did influence him to his prejudice, equity will interfere and grant him relief.

Willard's Eq. Jur. 150.
Ainslie vs. Medlycott, 9 Ves. 91.
Smith vs. Richards, 13 Pet 38.
Harding vs. Randall, 3 Me. 332.
Trumbull vs. Gadsden, 2 S. C. Eq. 14.
McFadden vs. Taylor, 3 Cranch, 281.

"And even if by mistake, and innocently, a a party represents a material fact upon which another is induced to act, it is as conclusive a ground of relief in equity as a wilful and false assertion." Id.

Cited with approval in case of Sweezy v. Collins, 36 Iowa.

The above authorities and the doctrine which they lay down and sustain are decisive of this case, but when taken in conjunction with the maxim of law that fraud vitiates everything it enters

into and annuls all contracts tainted with it, there can be but one conclusion for the court to come to in this case, viz, that defendants recover back their money which they paid on the property.

What is necessary to be done in order to rescind.

Mr. Bishop says the term denotes the avoiding of a contract. The party who finds himself defrauded may, unless some obstacle intervenes rescind if he chooses, but as the rights of innocent third parties acquired for value cannot be affected thereby if they have attached, he is too late to rescind, nor can he rescind from any other cause if the parties cannot be placed in statu quo. The rule as to placing in statu quo is that one proceeding to rescind must either give back of offer to return whatever of any value to himself or the other he has received under the contract, *yet he need not include in this what is without possible benefit.*

To illustrate: When worthless lime was sold in casks for good, it was held that the lime need not be returned on a rescission, but the casks must. There are cases so exceptional in their nature that no offer to return the thing need, it appears, precede the bringing of the suit.

Bishop on Contracts, Sec. 679 and citations to to note 7

We say here that the vendors are and always have been in statu quo. They never having given anything of value by the deed in which occurred the misdescription it was unneccessary for Reed

and Henderson to offer the deed back It was of no value to either party, and therefore comes within the rule laid down above. It must be something of value, and Reed and Henderson received nothing of any value at all. He need not include in this what is without possible benefit. Volumes written upon this subject would not make it plainer.

Now as to the time of rescission, the evidence shows that it was made one day after the abstract was by the vendees procured at their own expense. The promised abstract from the vendors was never forthcoming, but the vendees were forced to procure one at their own expense, and then they for the first time discovered that they were defrauded; that the vendors had not a good title to the same, and that there had been a misdescription in the deed, and the next day the recission was made. Bishop says that the rescission must be prompt or within a reasonable time.

"And unless barred by the statute of limitations it is never too late while the fraud remains undiscovered." The party likewise is given t me to inquire into and ascertain his legal rights. The circumstances of the cases vary, and it is impossible to set down the number of months or years within which a suit must be brought.

Bishop on contracts, Sec. 680.

So there can be no point made that the defendants did not rescind in time and promptly;

whereas the possession of the property was in the vendors always.

Notice of rescission:

It is sometimes stated that rescission must be with notice to the other party. Doubtless if anything is to be returned it should be with a statement of the reason, *but in other circumstances no notice in advance of judicial proceedings is universally or generally required.*

Bishop on Contracts, Sec. 681.

Besides respondents gave all the notice required according to Henderson's testimony which stands uncontradicted, and he also refused the quit-claim deed and informed the plaintiffs that the vendees had rescinded the contract and gave his reasons for it, which is also uncontradicted. But supposing for the purposes of this argument that the defendants in this action had never rescinded the sale until this action was brought and their cross bill had been filed, would the court doubt for a minute if the title was imperfect and false representations had been made by the vendors concerning it, that they could at that time when they filed their answer and cross complaint have elected to rescind without giving any notice whatever? The evidence shows in this case—and is uncontradicted—that the defendants did not know where the property was, and have not seen it to this date, and that the plaintiffs have been in possession of the property all the time.

Again supposing that there had been no misdescription in the first warranty deed given by the plaintiffs, and they had brought this foreclosure action and had sold the property without any appearance on the part of the respondents, would the counsel for the appellants contend for a moment that the respondents could not have sued on the warranty for breach of covenant if at the time the deed was given they had not a good title?

The case of Reeser vs. Carney, 54 N. W., page 89, is direcily in point with this argument. That was a case where the plaintiffs sued the defendants for breach of covenant in a deed for a good title which had come through several conveyances from the Northern Pacific Railway Company under an Act of Congress. In that case the plaintiffs had been been foreclosed out under the purchase price of the mortgage, and one year after the foreclosure they sued for breach of covenant in their deed; and the court held in that case that there had been a breach of warranty from the very minute that the deed had been executed, and the plaintiffs were allowed to recover.

Again, when the Union Pacific Railway granted to Adams and Shilling the 320 acres, the deed for which was recorded July 5th, 1890, they made a reservation of all coal and other minerals; and the Union Trust Company when it joined in that deed releasing their mortgages, expressly makes its quit-claim and release to all the right, title and interest in the land that the railway company

granted to Adams and Shilling. but subject, nevertheless, to the reservations that the railway company held in itself. Again, when the railway company quit-claimed to Adams and Shilling it only released its right to prospect for coal, and not other minerals, and it still retains the right to enter upon said land and to prospect for other minerals.

"In the construction of deeds the object of all rules is to ascertain the intent of the parties; and in construing the words of a grant of a covenant of qualification, condition, restraint, exception or explanation every word should be presumed to have been used for some purpose and should be deemed to have some force and effect if they can have."

Hickey v. Lake Shore Railway Co., 36 *N. E.* 674.
Devlin on Deeds, *paragraph* 840.
19 *Pick*, 250-252.

"An incumbrance is defined to be any right to or interest in land which may subsist in third persons to the diminution of the value of the land and not inconsistent with the passing of the fee in it by the deed of conveyance.

Burr vs. Lamaster, *46 N. W. 1016, and citations.*

A covenant is said to run with the land when neither the liability to perform it or the right to

take advantage of it, passes to the assignee of the land."

Idem, 1017, *and citations*

The existence of the incumbrance does not depend upon the extent or amount of the diminution in value; for the right or interest in the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of if did not exist. His land is in law diminished and incumbered.

Idem, 1018.

A covenant against incumbrances covers those unknown as well as those known at the time of the purchase.

Idem, 1018.

A purchaser of vacant real estate receiving a deed therefor with a covenant of seisin from one who has no title, the covenant being wholly broken, is not compelled at least after he has commenced an action for a breach of the covenant for the recovery of the purchase money paid to accept a title which his grantor may then acquire.

Reaser v. Carney, 54 N. W. 89.

An incumbrance within the terms of a covenant against incumbrance includes every right or interest in the land to the diminution of the value

and inconsistent with the passage of the fee for the land."

20 N. E. 581.
10 Am. St. Rep. 433.

Again should Reed and Henderson have accepted the quit claim deed of September 29th, 1891, which the plaintiffs on that day tendered them? The evidence, which is uncontradicted, shows that the defendants refused to accept that deed for the reaaon that the appellants did not have a good title to the land described in the same: and also that it was not a full warranty deed, and which they claim they were entitled to.

Bishop says in speaking of "Rescission:"

"This term denotes the avoiding of a voidable contract."

Bish. on Cont., 679.

See also Secs. 642, 653, 659, and 662, where the doctrine laid down in Joliffe v. Baker, is criticised and limited. See also Secs. 687 and 692 on Rescission.

Appellants say that all previous proposals are merged in the deed but that there are exceptions to the rule and that FALSEHOOD AND FRAUD ON THE PART OF THE VENDOR are among the exceptions and that is just what we claim to be the matter with this case FALSEHOOD AND FRAUD.

We maintain that this was never an executed contract. The minds of the parties never met.

The title to three hundred acres of this land was

not in the appellants until after the rescission was made—more than one year after they agreed to furnish an abstract and good title to the land. And we contend that to day they cannot give a good title to any part of it as shown by the record.

When a person by means of false representations of facts materially affecting the identity and value of real estate, indnces another to enter into a contract for the purchase thereof, upon the faith of such representations, and upon which he was justified in relying, the purchaser may, in an action brought by the vendor for the purchase price, recoup the damages which he sustained by reason of such false reptesentations, although the vendor believed them to be true when made, and had good reason for so believing.

Mulvey v. King, 39 Ohio St., p. 491.
Bishop on Contracts, Sec. 662.
Day v. Lown, et al., 1 N. W., 790, 51 Ia., 364.

"A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity; whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther, and includes instances of fraudulent representation which do not exist in law."

In Traill v. Baring, 4 De Gex, J & S, 318, 328, Turner, L J., said:

"I desire in the first place to absolve the defendants from all imputation of any intention of actual fraud. But that by no means disposes of the case; for there are many states of circumstances in which there is technical fraud; in which transactions are fraudulent in the eyes of this court, or characterized by the designation of fraud, although there may be no moral fraud. The question really here is, whether this case does or does not fall within the range of those cases in which this court holds a tran-action to be fraudulent, although it may not be morally so."

In Ship v Croskill, L. R., 10 Eq., 73 and 83, Lord Romilly said:

"I fully adopt the distinction expressed by Lord Ridesdale, between fraud properly so-called, and what is called constructive fraud, where persons have really been guilty of no moral fraud, but by a species of construction of equity they are said to be guilty of a fraud."

In using the word "constructive" here, the Master of Rolls plainly does not refer to that main division of fraud called "constructive" in contrast with the division called "actual." He is speaking of those instances belonging to the general division "actual," in which the fraud arises from the construction of equity, in contradistinction to the fraud at law, which must always be immoral.

Pomeroy Equity Jurisprudence, Sec 885, and authorities cited to note 2:

> "The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification that there are no reasonable grounds for the persoa's believing his statement to be true. In other words, it is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material."

Pomeroy Equity Juris., 887 and note 2, 888 and authorities cited to note 1, on page 1,249:

> "In setting up a material misrepresentation to defeat the specific performanee of a contract the element of a scienter, of knowledge, of belief with or without reasonable grounds, or of intent, is wholly unnecessary and immaterial So far as this most essential element of a fraudulent misrepresentation is concerned, it is sufficient to defeat a specific performance that the statement is actually untrue so as to mislead the party to whom it is addressed. The party making need not know of its falsity, nor have any intent to deceive; nor his belief in its truth make any

> difference. With respect to its effect upon the specific performance of a contract, a party making a statement as true, however honestly, for the purpose of influencing the conduct of the other party is bound to know that it is true, and must stand or fall by his representations."

The point upon which the defence turns is the fact of the other party having been misled by a representation calculated to mislead him, and not the existance of a design to thus mislead. It follows as a plain consequence af this general doctrine that if a party makes a representation whereby another is induced to enter into an agreement, he cannot escape from its effects by alleging his forgetfulness at the time of the actual facts

> Pom. Equ. Jur. Sec. 889, and authorities cited to note 1 on page 1250.

> "It is often said that, in order to render false representations fraudulent in law, it must be made to appear that the party making them knew at the time that they were untrue But this rule has so many exceptions that it is difficult to affirm, with any confidence, that it is a general rule at all."

It is certain that courts of equity do not limit their action to it in giving relief, when representations prove to be untrue in fact. Says Mr. Justice Storey:

"Whether the party thus misrepresenting a material fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party."

Cooley on Torts, Second Ed., p. 582,
Star p. 498.
Storey Equity Juris., Sec. 193.
Mayer v. Salazar, 84 Cal., 660

Counsel for appellants contend that inasmuch as a misake in the discription of the land intended to be conveyed was made in the first deed, which contained the statutory warranties, the plaintiffs had a right to tender a quit claim deed for the reason that the respondents could rely on the warranty of the first deed. But if that argument is true than it was not incumbent upon the appellants to tender any kind of a deed at all; for if the respondents could rely upon the first deed for one warranty or for anything contained in it then they could rely upon it for all the warranties and everything else it contained. That this argument is fallacious needs only to be stated in order to be understood. The court can readily see that according to the content on of the appellants that if a mistake were made concerning the description in the first deed

which was a contract and then another deed was made containing the right description of land and the respondents had accepted that deed, then the respondents would have waived all the warranties under the first deed unless there was fraud or mistake in the second deed. The rule of law is that where a contract in made concerning a subject matter but there is a mutual mistake and a new contract is made and accepted by the parties all the rights and obligations of the parties are merged in the new contract and neither one can resort to the old contract.

Admitting for this particular argument that the appellants had a good indefeasible estate in fee simple to the 440 acres in township five, the quit claim deed was not such a deed as the respondents were bound to accept. They had a right to reject that deed as being insufficient and not according to the agreement.

If counsel are earnest in their contention that the respondents could still rely upon the covenants in the warranty deed that contained the wrong description, why did they insert the special covenants and agreements in the quit claim deed? If the appellants could make on September 29th, 1891, two warranties concerning the title of section five, in township six, as it stood of record on March 27th 1890, could they not also make the six warranties concerning the title to the same land as it stood on March 27th, 1890? On September 29th, 1891, when the appellants tendered the quit claim deed to the respondents, appellants knew that their statements in said deed were false, for their attention had been particularly called to the reservation of the Railway to the coal and other minerals in their deed that was recorded July 5th, 1890 in Book 1, page 413.

The court will please notice that this action was commenced on Januaay 7th, 1892, and this quit claim deed of September 29th, 1891, was brought into court for the benefit of the defendannts. On January 8th, 1892, the plaintiffs put on record their quit claim deed which purports to release the coal reservation from the railway. It does not appear that the defendants ever knew of the quit claim deed from the railway, however, until after the commencement of this action.

For the reasons heretofore set forth we contend no error was committed by the trial court and therefore the judgment should be affirmed.

Respectfully submitted,

CHARLES C. RICHARDS,
J. H. MACMILLAN,
Attorneys for Respondents Henderson et al.

Opinion of the Court.

the company the exclusive right to prospect for coal and other minerals on the lands. A. & S. contracted to sell this tract to R. & H., representing that they had a good and indefeasible estate in fee simple in it, and agreeing to furnish an abstract of title. R. & H. agreed to buy the tract for a sum named, to be paid partly in cash and partly by notes secured by mortgage on the property. The deed, mortgage, notes and money payments were accordingly made and exchanged in supposed compliance with the agreement, but no abstract of title was furnished. In the deed and mortgage the land was by mistake of the scrivener described as township No. 6 instead of township No. 5. A. & S. had no interest in or title to land in township No. 6. No patent was ever issued by the Government for land in township No. 5. R. & H., on learning the facts, demanded the return of the money paid, and of the notes, claiming to rescind the contract of sale. A. & S. tendered a deed of the land in township No. 5. Subsequent to the tender, the Union Pacific Company released the land from claim under the coal reservation, but not as to other minerals. *Held*, that R. & H. were not bound to accept the deed tendered, and were entitled to have the contract rescinded, and to receive back the money paid by them.

THE case is stated in the opinion.

Mr. J. M. Wilson for appellants. *Mr. John F. Dillon*, *Mr. E. Ellery Anderson* and *Mr. P. L. Williams* filed a brief for same.

Mr. Charles C. Richards and *Mr. James H. Macmillan*, for appellees, submitted on their brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By a final decree of the District Court of the Fourth Judicial District of the Territory of Utah a contract for the sale of certain land, made March 27, 1890, between L. B. Adams and W. N. Shilling on one side, and Edward A. Reed and H. H. Henderson on the other side, and three promissory notes given by the purchasers, together with a mortgage executed by them to secure the payment of such notes, were adjudged to be null and void.

It was also adjudged that Henderson and Burgitt — the latter having become guardian of the person and estate of Reed who was incapable of conducting his own affairs — recover of Adams and Shilling the amount paid by Henderson

and Reed on the agreed price of the land purchased by them from Adams and Shilling.

The decree was affirmed by the Supreme Court of the Territory, and the case is here for review upon the appeal of Adams and Shilling.

The material facts out of which the case arises, and which are embodied in a report of a special master in chancery, are as follows:

In March, 1890, Shilling and Adams, in response to an inquiry made by Reed and Henderson, stated that they owned and had a good, indefeasible title in fee simple to 440 acres of land lying a few miles west of Ogden City, Weber County, Utah Territory.

The lands referred to — as was understood by all parties at the time — were the east half of section nine, township *five* north of range two west of the Salt Lake meridian; the south half of the southwest quarter of said section; and the northeast quarter of the southwest quarter of that section.

Reed and Henderson had not at that time seen the land, and had no knowledge as to the title. But Shilling and Adams promised that they would furnish an abstract of title. Reed and Henderson, relying and acting upon the representation of Adams and Shilling that they had a good and indefeasible estate in fee simple to the lands inquired about, without investigating the title, purchased an undivided two thirds interest in the 440 acres for the sum of $7333.32, of which one third was to be paid and was paid in cash, and time was given for the payment of the balance with interest. They would not have made the purchase if they had not believed the above representation as to title to be true.

On the 27th of March, 1890, Reed and Henderson received from Adams and Shilling a deed of general warranty for the following land: An undivided two thirds of the east half of section nine, township *six* north of range two west of the Salt Lake meridian, of the south half of the southwest quarter of that section, and of the northeast quarter of the southwest quarter of the same section, in Weber County, Utah.

The land contracted for, it will be observed, was in town-

ADAMS *v.* HENDERSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 70. Argued and submitted November 1, 1897. — Decided December 6, 1897.

A. & S. owned a tract of land in a township numbered 5 which was within the limits of the Union Pacific Railroad grants and was acquired from that company after the execution of its mortgages, its deed reserving to

ship *five*, while the land actually conveyed was in township *six*. But the grantors intended by the above deed to convey an undivided two thirds of the land in township five, and the grantees supposed that the estate embraced by the conveyance was that which they intended to purchase. But by mistake of the scrivener, the premises conveyed were described as lying in township six.

At the time the above deed was received the grantees, in addition to the cash payment of one third of the purchase price, executed two promissory notes payable to the grantors for the sum of $2444.45, each bearing eight per cent interest, payable one year and six months from March 26, 1890, and secured by a mortgage on the premises. But in that mortgage, by the mistake of the scrivener who prepared it, the land was described as lying in township six. The mortgage was duly signed, witnessed and acknowledged, Reed and Henderson, at the time, fully believing and acting upon the representation of the grantors as to title, and paying to the grantors the interest on said notes down to and including September 26, 1890, which amounted to $180. They also signed a promissory note of June 26, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, as the interest on the above notes, which were held by the bank. The note last named was brought into court, and when the final decree was rendered it was still in court for the defendants.

The plaintiffs Shilling and Adams failed to furnish an abstract of title; and Reed and Henderson, having an opportunity to sell the land in township five, and assuming that that was the land conveyed to and mortgaged back by themselves, procured an abstract on the 3d day of September, 1891.

The above lands in township five are within ten miles of the line of the Union Pacific Railroad, and within the limits of the lands granted to that company by the act of Congress of July 1, 1862, c. 120, 12 Stat. 489. They lie in a valley at the base of the Wasatch Mountains, and had theretofore been used and cultivated as agricultural lands. But no exploration or examination has ever been made on them for coal or minerals of any kind or description.

As bearing on the condition of the title to the land in township five, it may be stated that the Union Pacific Railroad Company twice mortgaged all the lands granted to it by the act of Congress of July 1, 1862, c. 120, 12 Stat. 489, and the act amendatory thereof approved July 2, 1864, c. 216, 13 Stat. 356, one of the mortgages being dated April 16, 1867, and the other December 18, 1873.

Adams and Shilling acquired by proper conveyance made in 1889 all the interest of the Union Pacific Railroad Company in the lands in township five sold by them to Reed and Henderson, and freed from the liens created by the above mortgages, except that the deed received by them from that company contained a clause, *reserving* "to the said Union Pacific Railroad Company the *exclusive right* to prospect *for coal and other minerals* within and underlying said lands, and to mine for and remove the same if found, and for this purpose it shall have the right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor."

No patent has ever issued from the Government for the land in township five.

Parties applied to Reed and Henderson for the purchase of that land, but they declined and refused to buy, and a sale by them was defeated.

Within two days of the 3d of September, 1891, and before the bringing of this action, Reed and Henderson ascertained that the plaintiffs were not the owners of and had no title to the land which the deed from Adams and Shilling purported to convey to them, that is, to the land in township *six*.

On or about the 4th day of September, 1891, Reed and Henderson notified Adams and Shilling that they rescinded the contract of sale, and demanded not only the return to them of the moneys paid on account of their purchase, with interest, but the surrender of the two notes of $1444.45 each, bearing date March 27, 1890, and the note for $391.10, dated June 26, 1891. All of those notes had been returned by the bank to Adams and Shilling.

After Reed and Henderson notified Adams and Shilling of

the rescission of the contract of sale, and before the bringing of this suit, Adams and Shilling tendered another deed — a special warranty deed, containing a proper description of the land intended to be sold by them to Reed and Henderson. The latter refused to accept that deed, saying that they rescinded the contract of sale; that Adams and Shilling did not have a good title to the land described therein; and urging the objection also that the deed was not one of general warranty. The deed so tendered was dated September 29, 1891.

At the time Adams and Shilling tendered the deed of special warranty, the title to the land therein described was incumbered by the above reservation in the deed of 1889 made by the Union Pacific Railroad Company to Adams and Shilling, of an exclusive right in the Union Pacific Railroad Company to mine, under said land, for coal and other minerals, and to remove the same.

Subsequently, the Union Pacific Railroad Company executed and delivered to Reed and Henderson a quitclaim deed dated November 2, 1891, and which was acknowledged November 17, 1891, and duly recorded on the 8th of January 1892. This deed released the land in township five from the claim of that company under the *coal* reservation contained in the deed of 1889. But it did not release the right of that company to prospect for and mine "other minerals" under that land.

On the 28th of March, 1890, Reed and Henderson let, leased and demised unto Adams and Shilling, who were occupying the land, for the term of six months from that date the land in township five. But neither Henderson or Reed ever actually occupied any part of it.

Neither of the notes described in the mortgage of March 27, 1890, made by Reed and Henderson have been paid. Adams and Shilling are still the owners and holders of them, as well as of the mortgage. The amount unpaid on those notes is the principal of each one, with interest from September 26, 1890, at the rate of eight per cent. per annum.

The relief sought by the suit was a decree reforming the mortgage given by Reed and Henderson so as to correctly

describe the land in township five, and then a sale thereof in satisfaction of the costs of the action, and the balance of the purchase money, with a personal decree for any deficiency in purchase price that may be found to exist.

The defendants controverted the right of the plaintiffs to any decree, and, by cross-complaint, asked the cancellation of the above mortgage and notes, and a judgment for the amount they had paid to the plaintiffs with interest.

The decree rendered was in accordance with the prayer of the cross-complaint. In legal effect it was a decree rescinding the contract between the parties, because of the inability of the plaintiffs to make a sufficient title to the land sold by them.

Under the facts thus stated, the case is within a very narrow compass. It is found, and the plaintiffs and defendants agree, that the former intended to sell, and the latter intended to buy, the land in township five. By mistake the vendors conveyed land in another township which they did not intend to sell, to which they had no title, and which the defendants had no thought of buying; and by mistake the grantees, in order to secure the purchase price for the land they in fact purchased, mortgaged back to the plaintiffs the land in township six which the latter had assumed to convey to them. That a court of equity has power to correct this mutual mistake, make the instruments given in execution of the contract conform to the real intention of the parties, as established by clear and convincing proof, and hold the parties to their actual agreement, cannot be doubted.[1] But before the mortgage executed by the defendants can be reformed so as to properly describe the land which the plaintiffs intended to sell, and which the defendants intended to buy and mortgage

[1] *Snell* v. *Assurance Co.*, 98 U. S. 85, 88, 89; *Simpson* v. *Vaughan*, 2 Atk. 31; *Henkle* v. *Royal Exchange*, 1 Vesey Sen. 317; *Gillespie* v. *Moon*, 2 Johns. Ch. 585; *Kisselback* v. *Livingston*, 4 Johns. Ch. 144, 148; *Inskeep* v. *Proctor*, 6 T. B. Mon. 311, 316; *Hendrickson* v. *Irvin*, 1 N. J. Eq. 562, 568; *Wesley* v. *Thomas*, 6 Har. & J. 24, 26; *Newsom* v. *Bufferlow*, 1 Dev. Eq. 379; *Brady* v. *Parker*, 4 Ired. Eq. 430; *Bailey* v. *Bailey*, 8 Humph. 230; *Clopton* v. *Martin*, 11 Alabama 187.

back, it must appear that the plaintiffs have such title as they represented themselves to have when selling the land. A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others.

That the plaintiffs have no such title is too clear to admit of dispute. They hold under the Union Pacific Railroad Company. They accepted a conveyance from that company which expressly reserved, in its favor, and without limit of time, an exclusive right not only "to prospect for coal and other minerals" under the land in question, and "to mine for and remove the same if found," but "a right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor." It does not appear that the railroad company is under any legal obligation to surrender or waive this reservation. The plaintiffs cannot compel it to do so. It is true that the reservation was subsequently released or withdrawn, so far as it related to coal, but it is in full force as to other minerals. So that the plaintiffs, in effect, ask that, instead of a good and indefeasible title in fee simple, the defendants shall take and pay for land incumbered with the right of the railroad company for all time, to pass over and across it for the purpose of prospecting for and mining minerals other than coal. A court of equity could not compel the defendants to take and pay for land thus incumbered without making for the parties a contract which they did not choose to make for themselves. "Equity," this court said in *Hunt* v. *Rousmanier*, 1 Pet. 1, 14, "may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences."

Reference was made in argument to the fact that no patent has ever been issued to the railroad company for the land in

question, and it has been suggested by the defendants that if it was discovered, before a patent issued, that it was mineral land, the title of the company would fail altogether; for the grant made by Congress to the company did not include mineral lands. *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288, 381. We do not think it necessary to consider this aspect of the case, nor to determine whether the plaintiffs would be entitled to the relief asked, if the mineral reservation had not been made by the railroad company, and nothing else appeared affecting the title except the fact that no patent had been issued by the United States, together with a possibility that before the issuing of a patent the land might be ascertained to be mineral land which did not pass under the grant by Congress. We forbear any expression of opinion upon that point, because if it be assumed for the purposes of this case that the fact just stated would not stand in the plaintiffs' way, we are of opinion that the mineral reservation made by the railroad company is in itself such an incumbrance as prevents the plaintiffs from making a good and indefeasible title to the land.

It is suggested that the reservation as to "other minerals" ought not to be deemed an obstacle to the relief asked, because it may never appear that there are any minerals under the land; that it cannot be assumed in the absence of proof that the defendants are likely to be disturbed in the full and complete enjoyment of the land for every purpose for which it is adapted. On the other hand, it cannot be affirmed, in view of the discovery of valuable minerals in many parts of the West, that there are no minerals, other than coal, under the land in question. What the defendants are entitled to is a marketable title — a good and indefeasible title in fee. But that they will not obtain, if forced to take the land subject to the railroad company's right of way over it for the purpose of prospecting for and mining minerals, which may be taken off, when found. From that burden they cannot be relieved in any way except by the voluntary action of the railroad company.

But it is contended by the plaintiffs that the act of March 3,

1887, c. 376, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," 24 Stat. 556, the act of March 2, 1896, c. 39, 29 Stat. 42, and the concurrent resolution of June 10, 1896, 29 Stat. App. p. 14, confirmed as against the United States the right and title of *bona fide* purchasers of lands contained within the limits of railroad grants; so that, as against such *bona fide* purchasers, the United States, by the acts cited, expressly disclaims any rights whatever, and confirms absolutely the title of such *bona fide* purchasers. By this contention is meant that the act of March 3, 1887, as the same has been construed by this court in *United States* v. *Winona & St. Peter Railroad*, 165 U. S. 463, and with precisely the title of Adams and Shilling as *bona fide* purchasers, even if, before a patent was issued by the United States, the lands in question should prove to be mineral lands.

It is sufficient, upon this point, to say that if the legislative enactments referred to have any reference whatever to *mineral* lands — if they were held applicable to lands purchased in good faith from the railroad company, and which turned out to be mineral lands that Congress never granted — that would only remove one of the difficulties which, it is insisted, are in the way of plaintiffs. For, if the plaintiffs' title is, under the legislation of 1887 and 1896, good as against the United States, there will still remain the incumbrance upon it arising from the right reserved by the railroad company, for all time — whether the plaintiffs or their vendees consented or not — to go upon the lands in question, for the purpose of prospecting and mining for minerals other than coal, and removing any found there. A patent would convey the interest of the United States in the land. But it would not destroy or release the mineral reservation made by the Union Pacific Railroad Company in its deed to Adams and Shilling. Purchasers from Adams and Shilling would be bound by that reservation, even if the United States issued a patent to the railroad company or to its vendees.

The result of these views is that the defendants were not

Statement of the Case.

bound to accept the deed tendered by the plaintiffs; and as it appears that the plaintiffs cannot make such a title as they agreed to give, as the cash payment was made upon the basis of a good and indefeasible title in the plaintiffs, the defendants were entitled upon their cross-complaint, framed in accordance with the established modes of procedure in the Territory, to have a decree which, in effect, rescinds the contract, and gives them back what they paid.

Affirmed.